Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES, *Petitioner*,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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of the United States

QUESTIONS PRESENTED

When the Milwaukee Redevelopment Authority took by eminent domain the 11-story downtown building that housed the offices of Post 2874 of the Veterans of Foreign Wars (VFW) as a long-term lessee, the Wisconsin Supreme Court held 4 to 3 that—as a matter of law—the VFW was not entitled to present *any evidence* of value, nor entitled to recover *any compensation whatever* for its concededly valuable long-term leasehold.

The questions presented are:

1. Does it violate the 5th and 14th Amendments for Wisconsin—like some jurisdictions, but in conflict with others and with this Court's repeated insistence that the appropriate question in an eminent domain proceeding is "what has the owner lost, not what has the taker gained"—to apply its "undivided fee rule" in such circumstances?

2. Did the court below violate VFW's constitutional right to due process of law by precluding it, as the owner of a valuable interest in property being taken through eminent domain, from introducing *any* evidence of the value of its leasehold property?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption

- City of Milwaukee Post No. 2874, Veterans of Foreign Wars of the United States was the Plaintiff in the trial court, Appellant in the Wisconsin Court of Appeals, and the Respondent in the Wisconsin Supreme Court;

- Redevelopment Authority of the City of Milwaukee was the Defendant in the trial court, Respondent in the Wisconsin Court of Appeals, and the Petitioner in the Wisconsin Supreme Court.

Petitioner is a non-profit entity existing pursuant to an Act of the 74th Congress of the United States and recognized by Wis. Stat. § 188.11. The VFW files its tax returns pursuant to Internal Revenue Code §501(c)(19).

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PETITION FOR A WRIT OF CERTIORARI

City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States (hereafter either "Veterans of Foreign Wars" or "VFW") petitions for a Writ of Certiorari to review a final judgment of the Supreme Court of Wisconsin.

OPINIONS BELOW

The Circuit Court for Milwaukee County entered judgment that the Redevelopment Authority was not constitutionally required—as a matter of law—to pay the Veterans of Foreign Wars *any* compensation for the eminent domain acquisition of its 99-year leasehold (with more than 60 years left to run, and an option for another 99) in a building being taken for redevelopment. (App. D.) The Court of Appeals reversed in an opinion published at 746 N.W.2d 536, ordering a trial that included valuation of VFW's leasehold. (App. B.) The Wisconsin Supreme Court reversed the Court of Appeals in an opinion published at 768 N.W.2d 749 by a vote of 4-3, reinstating the $0 trial court judgment. (App. A.) Two of the four-Justice majority filed a separate concurring opinion to state that they felt bound to "follow Wisconsin's precedent" although they would have preferred to reach a different result. (The majority opinion is at App. 1, the concurrence

at App. 50, and the dissent at App. 52.) The Supreme Court thereafter denied the VFW's Motion for Reconsideration. (App. D.)

JURISDICTION

The Wisconsin Supreme Court entered judgment on July 17, 2009. The VFW's timely Motion for Reconsideration was denied by a split vote on November 4, 2009. The time to file this Petition was extended to April 2, 2010. (No. 09A681.)

This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, 5th Amendment: "...nor shall private property be taken for public use without just compensation."

U.S. Constitution, 14th Amendment: "...nor shall any State deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

> "The most disturbing element of this case is that the majority approves the unprecedented proposition that *no compensation is just compensation* for

> the taking of valuable property." (App. 76; dissenting opinion; emphasis added.)

The opinion that so disturbed the three dissenting Justices (and led two of the majority four to separately concur solely to express their distaste for the result and their belief that their concurrences were compelled by "Wisconsin's precedent") allowed the Respondent Milwaukee Redevelopment Authority to confiscate a long-term, low-rent leasehold (with a value exceeding one million dollars [see App. 101, 106) under which the Veterans of Foreign Wars occupied the ground floor of an eleven-story building in downtown Milwaukee.

This case deals with an anomalous eminent domain valuation concept known as the "undivided fee rule" (sometimes, the "unencumbered fee" or, as in Wisconsin, the "unit" rule). It is invoked when more than one party owns an interest in property being condemned. Though its doctrinal basis is obscure, the undivided fee rule holds that the court must value the fee simple interest in the property *as if owned by one person*, even though that is contrary to fact, and then *divide that amount* among the owners of the various interests. The rule thus assumes not only fictitious single ownership of the subject property, but that its value as so determined is

a limiting condition on compensation payable to the owners of all interests in it.

The undivided fee rule is concededly artificial. The obvious problem with it is that it ignores property interests (e.g., leaseholds)[1] whose owners are entitled to just compensation, and forces an appraiser to indulge in the fiction that the building is empty when in fact it is productively occupied—i.e., to value an imaginary building rather than the real one being taken.

The question is whether valuation by this fictional technique satisfies the 5th and 14th Amendments' guarantee that those whose property is commandeered for public use will receive just compensation, usually defined as fair market value. The result below speaks eloquently. The Veterans of Foreign Wars received $0 as compensation for a long-term lease, a lease that the majority opinion had to concede had value, even though application of

[1] Under Wisconsin law, one with a lease for more than a year is a "joint owner" of the real property. (*Maxey v. Redevelopment Auth.*, 288 N.W.2d 794, 387-388 [Wis. 1980].) Under federal law, a leasehold is a property interest compensable in eminent domain and must be valued to provide tenants with just compensation. (See *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303 [1976].)

the undivided fee rule forbade the VFW from presenting *any evidence* as to that value or receiving *any compensation* from the Redevelopment Authority for its taking.

This holding is contrary to the rule laid down by this Court, speaking through Justice Holmes, in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), that the determination of just compensation must focus on the owner's loss, not on the taker's gain—a rule the Court has consistently followed.[2]

The court below held otherwise. In so doing, however, that court highlighted the fact that state courts are in conflict about how to apply the *Boston Chamber* rule. Indeed, the opinion below demonstrated—by lengthy citation to the conflicting cases from around the country—the need for this Court to grant certiorari, analyze the issue, and resolve the conflict. (App. 25-28, nn. 31-32.)

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[2] As the Court confirmed in *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-236 (2003), the 5th Amendment's just compensation guarantee requires compensation "measured by the property owner's loss rather than the government's gain," a conclusion "supported by consistent and unambiguous holdings in our cases." States are free to provide *more* protection than the U.S. Constitution, but they cannot provide less. (*Kelo v. City of New London*, 545 U.S. 469, 489 [2005].)

STATEMENT OF THE CASE

The proceedings below were somewhat complex, beginning with administrative valuation followed by various trial court proceedings and multiple appeals, culminating in the decision brought here for review.[3]

Notwithstanding all of the procedural matters below, the essential facts and issues are straightforward. The Veterans of Foreign Wars was a tenant under a 99-year lease that was less than half finished, with a renewal option for another 99 years. The rent was $1 per year. The reason for those terms is that the VFW was the owner of the land before 1961, when it transferred title to a developer who constructed an eleven-story hotel on the property, with the VFW as the full ground floor tenant. *The VFW thus paid the rent for 198 years in advance with its title transfer.*

VFW's tenancy had existed on the same terms through three different building owners. The final one (the Maharishi Vedic University) never occupied the building during the seven years of its ownership and allowed the parts not occupied by VFW to fall into disrepair.

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[3] Earlier, unpublished, interim appellate decisions are at 2002 WL 207129; 2003 WL 22232032; 2006 WL 327920; and 2007 WL 610900.

Although the owner sought occupancy permits, the city refused to grant any.[4] Eventually, a sister City agency declared the building uninhabitable and ordered the Redevelopment Authority to demolish it.

Based on prices paid for properties its own appraiser viewed as comparable, the Redevelopment Authority awarded $440,000 for all interests in the property and an adjoining parking lot owned by the landlord. The Circuit Court allocated $300,000 of that to the VFW. The VFW appealed the amount of compensation as inadequate.

Early in the trial court proceedings, VFW made a formal "Motion to Resolve Constitutional Issue" (App. F), urging that use of the unit rule as it was sought to be applied here would violate both the state just compensation guarantee and the 5th and 14th Amendments to the U.S. Constitution. The trial court ordered the unit rule used. The issue was raised and briefed in each court

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[4] The record shows that in spite of Maharishi's several attempts to obtain a certificate of occupancy, the city consistently denied it. *None of this involved the VFW in any way.* VFW was not responsible for the condition of the remainder of the building nor, as a tenant, did it have either the duty or authority to repair it.

below, with the Court of Appeals expressly holding that use of the unit (or undivided fee) rule on these facts violated both the state constitution and the 5th and 14th Amendments to the U.S. Constitution. (App. 94-97.) Both sides briefed federal law in the Wisconsin Supreme Court and that court relied heavily on this Court's decisions—with one notable exception: it refused to follow *Boston Chamber*—dismissing it as "not persuasive" (App. 41), and laying down a legal holding directly contrary to it. (App. 49-50.)

When the case was tried under the undivided fee rule, the jury was ordered to value only the fee simple title, on the fictitious assumption that there was no tenant—which was contrary to fact. *The VFW was not allowed to present any evidence of the value of its leasehold*, so the jury was kept ignorant of its existence.[5] Because of the condition of the building on the 2001 date of value, and the cost to demolish it to make the land ready for redevelopment, the jury concluded that the Maharishi's fee simple title was worth $0. As a consequence, the VFW's share of that $0 was said to be $0. The VFW was ordered to give back the $300,000 it had been paid plus $87,348 in costs and interest. This was

[5] The testimony noted at App. 13 was *not* presented to the jury.

required by rigid application of the undivided fee rule, even though, in the Court of Appeals' words, "it is undisputed that the leasehold interest is of great monetary value." (App. 94.) In an earlier, interim appellate opinion, that court concluded that "[i]t is undisputed that ... VFW's...lease value...exceeded eight million dollars." (App. 101.)

While denying any compensation in this eminent domain proceeding, the Wisconsin Supreme Court made the startling suggestion that the remedy for the *government's* taking of the leasehold was a suit against the *landlord*. (In fact, the VFW had brought such a suit which Wisconsin courts dismissed.)

Because of the lack of doctrinal underpinnings for the "undivided fee rule" and the harsh consequences it can produce, courts—both state and federal—are in conflict and disarray over when, how, or even whether to apply the undivided fee rule. Some—like the Wisconsin Supreme Court here—apply it rigidly;[6] others say the rule is contrary to basic

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[6] We acknowledge that the court below said it would consider deviating from the rule in "rare and exceptional" circumstances. (App. 30.) If the facts in this case—where a long-term tenant receives $0 as "just" compensation—do not fit that description, it is hard to imagine facts that would.

concepts of just compensation law and refuse to apply it at all; still others use it as a rule of convenience for condemnors, but depart from it when necessary to provide just compensation to the owner of each interest being taken. (Cases discussed *post*, pp. 11-17.)

Boston Chamber is jurisprudentially identical to this case, except for which party sought to invoke the undivided fee rule to manipulate valuation. There, this Court held that cases like this contain two questions—one permissible and one not: "[T]he question is What has the owner lost? not What has the taker gained?" (*Boston Chamber*, 217 U.S. at 195.) Here, the taker gained a building that may have been worthless because of the cleanup and tear down costs, while the VFW lost a leasehold with great value. Rigid application of the undivided fee rule, as here, *requires* courts to answer the wrong question and measure compensation by what the taker gained, thereby ignoring the owner's loss.

This Petition raises the important question of the essential criteria for defining just compensation in eminent domain cases, and asks this Court to resolve an ongoing conflict among the lower courts about the proper application of its precedents in determining those criteria.

REASONS FOR GRANTING THE WRIT

I.

THERE IS CONFLICT IN THE LOWER COURTS OVER APPLICATION OF THE "UNDIVIDED FEE RULE" IN EMINENT DOMAIN.

The goal of eminent domain proceedings is to provide a "fair" manner of transferring private property into public ownership[7] by putting property owners "...in as good a position pecuniarily as if the property had not been taken."[8] This precept is intended to provide the owners with "...the full and perfect equivalent in money of the property taken."[9]

When property is subject to a lease, the state courts have created a cacophony of approaches. One—applied here by Wisconsin—requires results like the payment of $0 for a valuable leasehold interest that has more than a century-and-a-half yet to run, on the premise that all property interests are owned by one

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[7] *U.S. v. Fuller*, 409 U.S. 488, 490 (1973); *U.S. v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

[8] *Seaboard Air Line R. Co. v. U.S.*, 261 U.S. 299, 306 (1923).

[9] *U.S. v. Miller*, 317 U.S. 369, 373 (1943).

person, when the contrary is incontestably true. (*Post*, p. 14, n. 15.) That would be held unconstitutional elsewhere. (*Post*, p. 15, n. 16.)

The 14th Amendment provides a baseline of constitutional protection for all citizens. However, as long as the state courts are in conflict over basic 5th Amendment valuation precepts, there is no such baseline protection. The enforcement of the 5th Amendment's just compensation guarantee cannot be made to depend, for example, on whether one's case is tried in Wisconsin (where the undivided fee rule is rigidly applied) or on the other side of the Mississippi River in Iowa (where the rule has been rejected). (Compare the case at bench with *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 [Iowa 2004].) Similar conundrums apply at the Kansas/Nebraska and Pennsylvania/New Jersey borders.[10]

The majority opinion below acknowledges this conflict of authority, citing numerous cases

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[10] Compare *Moore v. Kansas Turnpike Auth.*, 317 P.2d 384, 390 (Kan. 1957) with *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 307-308 (Neb. 1946) and *New Jersey Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-830 (N.J. App. 1975) with *Garella v. Redevelopment Auth.*, 196 A.2d 344, 348 (Pa. 1964).

from each group. (App. 25-28, nn. 31-32.)

A.

Some Courts Apply The Undivided Fee Rule Rigidly.

The undivided fee rule works satisfactorily in routine cases.[11] That is, if the lease is at or near the market rate for leases in the area, then the value of what is taken will approximate the fee value of the property.[12] However, if the lease rate is favorable to the tenant, then the lease has a "bonus" value to the tenant equal to the difference between the market rent and the rent actually being paid.[13] Conversely, if the lease rate is higher than the market, then the value of the landlord's interest would be greater than the value of the property, absent the productive lease.[14]

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[11] As the standard national text notes, this "was *formerly* one of the most firmly established principles of eminent domain, and it is still the law in the *usual* case...." (4 Nichols, The Law of Eminent Domain, § 12.05[1]; emphasis added.)

[12] *New Haven Unified School Dist. v. Taco Bell Corp.*, 30 Cal.Rptr.2d 469, 471 (Cal. App. 1994)

[13] *Alamo*, 424 U.S. at 304.

[14] *DOT v. Drury Displays*, 764 N.E.2d 166, 170 (Ill. 2002).

One group of states, typified by the Wisconsin decision here, applies the undivided fee rule regardless of the circumstances.[15] The

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[15] *Harco Drug, Inc. v. Notsla, Inc.*, 382 So.2d 1, 6 (Ala. 1980); *National Advertising Co. v. State*, 611 So.2d 566, 569 (Fla. 1993); *City & County of Honolulu v. Market Place, Ltd.*, 517 P.2d 7, 14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *State v. Montgomery Circuit Court*, 157 N.E.2d 577, 578 (Ind. 1959); *Moore v. Kansas Turnpike Auth.*, 317 P.2d 384, 390 (Kan. 1957)(conceding that it is *contra* to *Boston Chamber*); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 848 (Ky. 1963); *State v. D&J Realty Co.*, 229 So.2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *Michigan State Highway Dept. v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Commn.*, 347 So.2d 341, 343 (Miss. 1977); *New Jersey Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-830 (N.J. App. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.2d 1214, 1220 (Okla. 2008); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-285 (W.Va. 1968); *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.E.2d 749, 759 (Wis. 2009).

Wisconsin Supreme Court actually held that application of the rule on these facts "*protects* the interests of both the public and *the property owners in the instant case*" (App. 30; emphasis added) even though its rigid application left the VFW evicted from its Post facilities without *any* compensation for the taking of its long-term leasehold. Just how confiscation protects the interest of the owner/lessee, the court below did not explain.

B.

Some Courts Refuse To Apply The Undivided Fee Rule, Holding That It Violates The Just Compensation Mandate Of The 5th and 14th Amendments.

Another group of states never applies the undivided fee rule.[16] They reason that the just compensation guarantee applies to the owner of

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[16] *Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 287, 289 (Ark. 1959); *U.S. v. Seagren*, 50 F.2d 333, 335 (U.S. App. D.C. 1931); *Wilson v. Fleming*, 31 N.W.2d 393, 401-402 (Iowa 1948); *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 (Iowa 2004); *City of Baltimore v. Latrobe*, 61 A. 203, 206 (Md. 1905); *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 311-312 (Neb. 1946); *Garella v. Redevelopment Auth.*, 196 A.2d 344, 348 (Pa. 1964).

each property interest being condemned. (*E.g.*, *Platte Valley*, 23 N.W.2d at 311-312.) As the undivided fee rule disregards the property interests being condemned and, instead, values only a fictitious fee simple estate (as if owned by a single entity), these courts hold that the undivided fee rule cannot provide the necessary constitutional protection to all owners whose property interests are taken.

Indeed, the theory of these courts is borne out by this Court's settled jurisprudence. As shown above, *Boston Chamber* refused to value divided interests as though they were consolidated in one owner, as that would defy reality as well as the 5th Amendment.

C.

Still Other Courts Use The Undivided Fee Rule As A Rule Of Convenience For Condemnors, But Depart From It When Necessary To Provide Just Compensation To All Parties Whose Property Interests Are Taken.

A third group recognizes that, although the undivided fee rule may provide a rule of convenience in many cases, it cannot be applied when doing so would deny just compensation to

the owner of a property interest being condemned.[17]

II.

THE UNDIVIDED FEE RULE IS OF QUESTIONABLE PARENTAGE AND IS CONTRARY TO THIS COURT'S MODERN JURISPRUDENCE.

The origins and validity of the undivided fee rule are as obscure as they are dubious. The standard, national eminent domain text describes the rule as a "remnant" from which

[17] *Alaska State Housing Auth. v. DuPont*, 439 P.2d 427, 431 (Alas. 1968); *People ex rel. Dept. of Pub. Wks. v. Lynbar, Inc.*, 253 Cal.App.2d 870, 879 (Cal.App. 1967); *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930); *State v. Hy-Grade Auto Court*, 546 P.2d 1050, 1053-1054 (Mont. 1976); *State v. Cowan*, 103 P.3d 1, 4 (Nev. 2004); *Gallatin Housing Auth. v. Chambers*, 362 S.W.2d 270, 275-276 (Tenn. App. 1962); *State v. Ware*, 86 S.W.3d 817, 824 (Tex. App. 2002); *State v. Burk*, 265 P.2d 783, 801 (Ore. 1954); *State v. Spencer*, 583 P.2d 1201, 1205 (Wash. 1978); *U.S. v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948)(L. Hand, J.); *U.S. v. 6.45 Acres*, 409 F.3d 139, 147-148 (3d Cir. 2005)(rule not "to be applied rigidly"); *U.S. v. 499.472 Acres*, 701 F.2d 545, 549 (5th Cir. 1983); *Nebraska v. U.S.*, 164 F.2d 866, 868-869 (8th Cir. 1947)("rule is not...autocratically absolute"); *U.S. v. Corbin*, 423 F.2d 821, 828 (10th Cir. 1970).

some states are "receding." (8A, Nichols, The Law of Eminent Domain § G23.04[1], n. 9.)

A.

The Apparent Basis Of The Undivided Fee Rule Is A Corruption Of The Concept Of *In Rem* Jurisdiction.

The undivided fee rule apparently had its origins in the idea that eminent domain proceedings are *in rem* and thus are only concerned with the property, not its owners. (8A, Nichols, The Law of Eminent Domain § G23.04[1], n. 9.) This is a misuse of the *in rem* concept, which deals with the mode by which a court obtains jurisdiction. (See *Shaffer v. Heitner*, 433 U.S. 186, 198-199 [1977]; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 [1950].) To label a lawsuit as one *in rem* or *in personam* also goes to the effect of the judgment (whether binding on the parties or on the world). (See *A.W. Duckett & Co. v. U.S.*, 266 U.S. 149, 151 [1924].) But it has nothing to do with the parties' constitutional rights—either substantive or procedural.

Facile and uncritical *in rem* assertions disregard two vital things. In a total taking, as here, the condemnor acquires not just some abstract "fee simple title," but also each and every property interest in the taken property. (*A.W. Duckett*, 266 U.S. at 151 [quoted *post*, p.

29].) It follows that it must pay just compensation for what each condemnee loses. The court below simply ignored two essential questions: (1) what does the "fee simple" title consist of, and (2) does the determination of just compensation require compensation for what the taker gained or what the owners lost? The answers are found in *U.S. v. General Motors, Inc.*, 323 U.S. 373, 377-378 (1945):

> "The critical terms are 'property,' 'taken' and 'just compensation.' It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. *In point of fact, the construction given the phrase has been the latter....*[The owner's] interest may comprise the group of rights for which the shorthand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years,' as in the present instance. *The constitutional provision is addressed to every sort of*

interest [the citizen may possess." (Emphasis added.)[18]

It is basic that owners of leaseholds, the same as owners of any other property interest, are entitled to just compensation when their leaseholds are taken by eminent domain. (*A.W. Duckett*, 266 U.S. at 151; *General Motors*, 323 U.S. at 377-378.)

Calling an eminent domain case an action *in rem* does not authorize either the condemnor or the courts to ignore the existence of valuable property—like the VFW's leasehold—as if that undeniably compensable interest somehow ceased to exist. The label affixed does not extinguish the parties' property interests in the taken property nor their right to receive just compensation when their property interest is taken for public use, nor to present evidence going to the merits of the valuation controversy. This error lies at the root of the

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[18] In takings cases, the Court has regularly used the property professors' analogy of property to a bundle of sticks or rights, where the taking of any stick from the bundle requires compensation. (E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [1979]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 [1982]; *Hodel v. Irving*, 481 U.S. 704, 716 [1987].)

holding below, which thus denied the VFW due process of law as well as just compensation.

In the seminal case of *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 325 (1893), the Court noted the *in rem* nature of eminent domain proceedings (in the sense that compensation is for the property taken), but then went on to stress that the "property" being taken consisted not only of the land and improvements, but also of the right to productive use. Thus, the condemnor was required to pay just compensation for the owner's lucrative franchise to operate locks and dams as well as for its tangible property because "such franchise was as much a vested right of property as the ownership of the tangible property...[,] subject to the limitations imposed by the Fifth Amendment...." (*Id.* at 345.)

Once a court has jurisdiction, its decisions affect the personal rights of property owners, as well as the property itself:

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification." (*Shaffer*, 433 U.S. at 212.)

Thus, calling an eminent domain case a proceeding *in rem* provides no jurisprudential

basis for the undivided fee rule: "[I]n *Mullane* we held that Fourteenth Amendment rights cannot depend on the classification of an action as in rem or in personam...." (*Shaffer*, 433 U.S. at 206.)[19] It cannot be used as the springboard for disregarding the constitutional mandate of compensation to all owners of all property interests in the condemned property.

B.

For At Least A Century, This Court's Decisions Have Shown The Absence Of A Constitutional Basis For The Undivided Fee Rule.

This Court's decisions have eroded, if not eliminated, the idea that eminent domain cases deal only with inanimate property, and not with the people who own it. *Boston Chamber* was clear: "The Constitution deals with people, not with tracts of land..." (217 U.S. at 195), thereby succinctly expressing the basis for refusing to apply the undivided fee rule.

Thus, the issue—as directly framed in *Boston Chamber*, is "What has the owner lost?" There, the answer was that the owners lost

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[19] "[T]his Court has adhered unwaiveringly to the principle announced in *Mullane*." (*Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797 [1983].)

nothing.[20] Here, the VFW lost everything—it was evicted and the building it occupied under a long-term, low-cost lease was razed. Then it was awarded $0 for its leasehold—and ordered to repay the Redevelopment Authority's initial $300,000 award *based on its own appraisal.*

The court below cited the decision in *Brown v. Legal Foundation* for the proposition that "compensation for a net loss of zero is zero." (App. 45 [quoting *Brown*, 538 U.S. at 240, n. 11].) But that quote from *Brown* in fact strengthens the VFW's case and shows the need for this Court's review. Dealing with lawyers' trust funds so small they could not generate sufficient income to cover their operating cost, *Brown* truly was a case with a "net loss of zero." Not so here, where the existence of substantial value in VFW's long-term leasehold is not questioned.

The Court has reiterated the *Boston Chamber* rule without deviation. (*U.S. v. General Motors*, 323 U.S. 373, 378 [1945]["The courts have held that the deprivation of the former owner rather than the accretion of a

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[20] The *Boston Chamber* owners sought to use the undivided fee rule in order to have the Court disregard an economically negative attribute of the property, and thereby permit them to receive more than their actual interests were worth.

right or interest to the sovereign constitutes the taking"]; *Brown*, 538 U.S. at 235-236 ["the 'just compensation' required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain"]; *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 13 [1949][quoting *Boston Chamber*]; *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 [1999][same].) When the Court concluded that the 5th Amendment "was designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole" (*Armstrong v. U.S.*, 364 U.S. 40, 49 [1960]), it emphasized that the public is required to bear public burdens, but also that the 5th and 14th Amendments' protection was intended for "people," not merely for dirt and bricks. (See also *Bauman v. Ross*, 167 U.S. 548, 574 [1897]["the rights of private owners are secured" through the 5th Amendment].)

Notwithstanding this Court's consistent statements, the lower courts remain—to this day, as the decision below shows—in conflict over use and application of those precedents in eminent domain valuation, particularly when applied to the undivided fee rule. Yet all of them purport to apply the same provisions of the 5th and 14th Amendments. Respectfully, that makes no sense.

Applied in a context like this, the undivided fee rule flies in the face of this bedrock precept—measuring compensation only in terms of what the taker gained while wholly ignoring the leasehold owner's loss.

The analysis noted above is appropriate for any part of the Bill of Rights, as all those amendments secure individual rights. The interrelatedness of all of those rights forms the foundation of the Court's Bill of Rights jurisprudence:

> "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. [Citations to Locke, Blackstone and others.]" (*Lynch v. Household Fin. Co.*, 405 U.S. 538, 551 [1972].)

This case is the proverbial "Exhibit A" for all that is wrong about rote application of the undivided fee rule. According to the jury (that was prevented from hearing any evidence of the value of VFW's lease), fee simple title to this property was worth $0 due to the high cost of demolition and site clearance.[21] But, as the Court of Appeals put it, "it is undisputed that [VFW's] leasehold interest is of great monetary value" (App. 94), indeed, "exceed[ing] eight million dollars." (App. 101). Even while ruling against VFW, the Wisconsin Supreme Court agreed that its leasehold was valuable. (App. 14, n. 10.) By collecting and highlighting multiple conflicting decisions from other state courts (App. 25-28, nn. 31, 32), the court below virtually asked this Court to review its decision and use this case to provide a consistent application of the 5th and 14th Amendments.

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[21] Of course, had the building's owner wanted to demolish it, it could not just evict the VFW; it would have had to pay VFW for its leasehold. It is difficult to see why, when the government steps into the landlord's shoes, the result should be any different—particularly since the Constitution *mandates* the payment of just compensation for the taking of leaseholds.

III.

THE UNDIVIDED FEE RULE VIOLATES DUE PROCESS WHEN IT PROHIBITS PROPERTY OWNERS FROM PRESENTING *ANY* EVIDENCE OF THE VALUE OF THEIR PROPERTY BEING TAKEN BY EMINENT DOMAIN.

In an eminent domain action the parties, however they are labeled, have a constitutional right to present evidence going to the merits. (*Walker*, 352 U.S. at 117; *Schroeder*, 371 U.S. at 213-214.) As this Court summarized, "it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." (*Bragg v. Weaver*, 251 U.S. 57, 59 [1919].)[22]

The *in rem* characterization of an eminent domain case does not trump the substantive constitutional mandate that just compensation be paid to the owner of a

[22] The Court has repeatedly opined on the requirement of notice and a meaningful opportunity to be heard in eminent domain litigation. (E.g., *Mullane*, 339 U.S. at 314; *Walker*, 352 U.S. at 117; *Shaffer*, 433 U.S. at 206; *Schroeder*, 371 U.S. at 213-214; see *Brody v. Village of Port Chester*, 345 F.3d 103, 112 [2d Cir. 2003].) Without the ability for all parties to present evidence, that right is meaningless.

leasehold in the taken property, nor does it authorize denial of due process by forbidding the owner of a concededly valid leasehold in the taken property to present any valuation evidence. To say otherwise would eviscerate these bedrock constitutional guarantees.

Here, however, the court below held, in violation of VFW's right to procedural due process, that it was not entitled to present *any evidence of the value* of its leasehold *at any time in the jury trial valuation proceeding.* The testimony noted by the court below (App. 13) came in a different part of the proceedings, outside the jury's presence. The VFW was in court solely because the Redevelopment Authority chose to acquire the property in which it owned a leasehold, and in an action whose sole purpose was to value all interests in the subject property so that all interests could be transferred to the Redevelopment Authority. Yet it was not allowed to present any evidence of the value of its leasehold. Why? The court below, despite the length of its opinion, never explained, asserting that inasmuch as a condemnor acquires the fee simple title, it need only pay the value of the undivided fee simple title it acquired (App. 32).

But as briefed *ante*, and contrary to the court below and the other defenders of the undivided fee rule, it is the deprivation of the

property rights of the owners, not the accrual of any right, title or interest to the taker, that constitutes the taking for which compensation must be paid. Thus, in *Del Monte Dunes*, 526 U.S. 687, this Court upheld an award of just compensation to an owner of the taken land even though the defendant city acquired no interest in it. It was loss of the right of use for which the owner received compensation.

VFW's leasehold was fully compensable. The Court emphasized the point in another opinion by Justice Holmes written after *Boston Chamber*:

> "Ordinarily an unqualified taking in fee by eminent domain takes all interests and as it takes the *res* is not called upon to specify the interests that happen to exist....In such a case we no more should expect to hear it argued that leaseholds were not to be paid for than that the former fee simple should not be, on the ground that it was gone and a new fee begun....Judgment reversed with directions to award proper compensation to the appellant [tenant]." (*A.W. Duckett*, 266 U.S. at 151.)

In *Boston Chamber*, it was the property owners who wanted to apply the undivided fee rule because they thought that the property would have greater value if considered as a

unitary ownership, regardless of the actual state of title. But the Court rightly would not allow it because that would divert the constitutional inquiry away from what the owners actually lost: "We regard it as entirely plain that the [owners] were not entitled, as a matter of law, to have damages estimated *as if the land was the sole property of one owner....*" (217 U.S. at 195; emphasis added.)

Even-handed justice requires that it should make no difference which party seeks to invoke the rule. Neither party should be able to have a court apply a fictional gloss to the 5th Amendment which advantages one side or the other in what is supposed to be an impartial inquiry into value. The constitutional bedrock is that those whose property is condemned must be compensated—and compensation must be based on the reality of title, not a fictionalized version that favors one side. Any "rule" permitting a major component of the property's value to be taken *without any compensation at all* mocks the idea of justice that is embodied in the constitutional mandate of just compensation.

CONCLUSION

In concluding this Petition, we are unable to improve on the way this Court phrased the governing principle: "The political ethics

reflected in the Fifth Amendment reject confiscation as a measure of justice." (*U.S. v. Cors*, 337 U.S. 325, 332 [1949].) And yet, outright confiscation of its concededly valuable leasehold was the fate of the Veterans of Foreign Wars in this case. That courts—both state and federal—are in disarray on this important point of eminent domain valuation law makes the case for certiorari compelling.

VFW prays that the writ issue.

Respectfully submitted,

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SUPREME COURT OF WISCONSIN

CASE NO.:	2006AP2866
COMPLETE TITLE:	City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States, Plaintiff-Appellant, v. Redevelopment Authority of the City of Milwaukee, Defendant-Respondent-Petitioner.
	REVIEW OF A DECISION OF THE COURT OF APPEALS 2008 WI App 24 Reported at: 307 Wis. 2d 518, 746 N.W.2d 536 (Ct. App. 2008 – Published)
OPINION FILED:	July 17, 2009
SUBMITTED ON BRIEFS:	
ORAL ARGUMENT:	February 4, 2009
SOURCE OF APPEAL:	
COURT:	Circuit
COUNTY:	Milwaukee
JUDGE:	Elsa Lamelas

JUSTICES:

CONCURRED: ZIEGLER, J., concurs (opinion filed). GABLEMAN, J., joins concurrence.

DISSENTED: PROSSER, J., dissents (opinion filed). CROOKS and ROGGENSACK, JJ., join the dissent

NOT PARTICIPATING:

ATTORNEYS:

For the defendant-respondent-petitioner there were briefs by *Grant F. Langley,* city attorney and *Gregg C. Hagopian*, assistant city attorney, Milwaukee, and oral argument by *Gregg C. Hagopian*.

For the plaintiff-appellant there were briefs by *Hugh R. Braun, Melinda A. Hein*, and *Godfrey Braun & Frazier, LLP*, Milwaukee, and oral argument by *Hugh R. Braun*.

An amicus curiae brief was filed by *James S. Thiel*, counsel for the Wisconsin Department of Transportation, and *Abigail C.S. Potts*, assistant attorney general, with whom on the brief was *J.B. Van Hollen*, attorney general, on behalf of the State of Wisconsin.

REVIEW of a decision of the Court of Appeals. *Reversed.*

¶1 SHIRLEY S. ABRAHAMSON, C.J. The Redevelopment Authority of the City of Milwaukee seeks review of a published decision of the court of

appeals reversing a judgment of the Circuit Court for Milwaukee County, Elsa C. Lamelas, Judge.[1] The judgment of the circuit court was that the Redevelopment Authority is not obligated under Article I, Section 13 of the Wisconsin Constitution to pay any sum to the City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States as just compensation for the taking of a parcel of real property in which the VFW held a leasehold interest. The judgment also required the VFW to return a $300,000 award that it had previously received from the Redevelopment Authority and to pay $87,348 in interest and statutory costs.

¶2 The court of appeals reversed the judgment of the circuit court and remanded the cause to the circuit court, instructing that "the VFW must be afforded an opportunity to prove the value of its separate leasehold interest" in the condemned property and to receive compensation therefor.

¶3 We reverse the decision of the court of appeals and affirm the judgment of the circuit court. We conclude that the unit rule the circuit court applied in the present case does not contravene the VFW's state constitutional right to just compensation.[2]

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[1] *City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee*, 2008 WI App 24, 307 Wis. 2d 518, 746 N.W.2d 536.

[2] We need not address additional issues that the Redevelopment Authority raises in its briefs to this court in support of its

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¶4 The circuit court applied the "unit rule" in determining the amount that the Redevelopment Authority had to pay the VFW as just compensation for the taking. Under the unit rule, when property that is held in partial estates by multiple owners is condemned, the condemnor pays the fair market value of an undivided interest in the property rather than the fair market value of each owner's partial interest.[3]

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position that the court of appeals erred in reversing the circuit court's judgment. The Redevelopment Authority argues that the doctrines of due process, law of the case, claim and issue preclusion, and waiver prevent the VFW from arguing to this court that the unit rule is unconstitutional as applied in the present case.

[3] *Maxey v. Redev. Auth. of Racine*, 94 Wis. 2d 375, 401, 288 N.W.2d 794 (1980) ("[C]ondemnation awards should be based on the value of the property as a whole as if there were only one owner, and it is only after there is a determination of the taken property's total value that it is apportioned among the various interests in the property."); 4 Phillip Nichols, *Nichols on Eminent Domain* § 13.01[16] (3d ed. 2007) (stating that the unit rule applies "when there are different interests or estates in the property acquired by condemnation" and that "[p]ursuant to the unit rule, the proper course is to determine the entire compensation to be awarded as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights").

Section 1012 of the Uniform Law Commissioners' Model Eminent Domain Code provides:

> The amount of compensation for the taking of property in which divided interests exist is based upon the fair market value of the property considered as a whole, giving appropriate consideration to the effect upon market value of the terms and circumstances under which the separate interests are held.

Model Eminent Domain Code § 1012, 13 U.L.A. 102 (2002).

Apportionment of the total sum awarded is then made among the owners. Fair market value is the sum a willing purchaser would pay to a willing seller for the property, taking into consideration the uses of the land.[4] The court is not being asked to determine the value of the VFW's leasehold interest or the cost to the VFW of obtaining comparable replacement facilities.

¶5 A jury found that the undivided interest in the property condemned in the present case by the Redevelopment Authority had no value at the time of the taking. In accordance with the unit rule and with the jury's verdict, the circuit court entered a

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[4] *P.C. Monday Tea Co. v. Milwaukee County Expressway Commission,* 24 Wis. 2d 107, 112-13, 128 N.W.2d 631 (1964) (stating that in a condemnation case, "[f]air market value is defined as that amount which can be realized on sale by an owner willing, but not compelled, to sell to a purchaser willing and able, but not obliged, to buy") (citation omitted); *Esch v. Chicago, Minneapolis & St. Paul Ry. Co.,* 72 Wis. 229, 231-32, 39 N.W. 129 (1888) ("The full and fair market value means what the property is worth or will sell for as between one who wants to purchase and one who wants to sell. . . . The market value, or what the property was worth to a person who would pay its just and full value, would certainly not exclude from the consideration of the jury the use to which the property was put by the owner; nor any reasonable use to which it could be applied by a prudent and discreet man in the immediate future.").

See also 4 Nichols, *supra* note 3, § 12.02[1] ("The term 'fair market value' means the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it, taking into consideration all uses for which the land was suited and might be applied.") (footnotes omitted).

judgment declaring that the VFW is not entitled to receive any compensation from the Redevelopment Authority and must reimburse the Redevelopment Authority for money paid to it.

¶6 The VFW contends that because the terms of its lease agreement were exceedingly favorable ($1 a year rent for a renewable 99-year term), the VFW's leasehold interest in the condemned property had value notwithstanding the property's lack of value. The VFW argues that under the circumstances of the present case, the unit rule operates to deprive it of just compensation contrary to Article I, Section 13 of the Wisconsin Constitution. The VFW thus challenges the circuit court's judgment on the ground that the circuit court improperly instructed the jury to determine just compensation according to the unit rule. The VFW urges the court to apply the "separate valuation" (or "independent valuation") rule in the present case in lieu of the unit rule to determine the fair market value of the condemned property.[5]

¶7 We state the issue on review as follows: If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just

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[5] *See* 4 Nichols, *supra* note 3, § 12.05[2] (contrasting the "rule of separate valuation" to the unit rule (also sometimes referred to as the undivided fee rule)); John D. Johnston, Jr., "*Just Compensation" for Lessor and Lessee,* 22 Vand. L. Rev. 293, 310-19 (1969) (contrasting the rule of "independent valuation of divided interests" to the unit rule).

compensation under Article I, Section 13 of the Wisconsin Constitution been violated? In other words, the court is asked to determine whether the application of the unit rule in the present case violates the just compensation clause when the fair market value of the property is zero, rendering the VFW entitled to $0 for the loss of its property interest as a lessee.

¶8 We conclude that using the unit rule in the present case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. We conclude that the VFW receives just compensation when it receives no compensation for its leasehold interest in a property that has no value. Accordingly, we reverse the decision of the court of appeals reversing the judgment of the circuit court. The judgment of the circuit court is affirmed.

¶9 Inquiring minds might ask how the property at issue in the instant case can be worth nothing. The property is located in the heart of the City of Milwaukee. Even if the building is worthless, isn't the land worth something, and doesn't the VFW as a lessee have an interest in the land upon which the hotel stands?

¶10 The answer is that the property as a whole is worth nothing because it is financially infeasible to use the property either by remodeling the hotel building or by demolishing the building to get at the unimproved land. An appraiser testified (and the jury apparently accepted) that the cost of remodeling the

building to make it usable would be more than the fair market value of the building and land. Furthermore, the appraiser testified, and the jury again apparently accepted, that although the unimproved land does have value, the value of the land in an undeveloped state is exceeded by the cost of demolishing the building to render the land vacant.

I

¶11 The Redevelopment Authority and the VFW have been parties to numerous proceedings relating to the Redevelopment Authority's taking of the property at issue. Many of these proceedings are not directly within the scope of our review and are not fully documented in the circuit court record in the present case. We do not offer a comprehensive account of the history underlying this case.[6] We briefly

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[6] The proceedings not discussed in this opinion may be summarized as follows:

The VFW commenced an action in February 2001 challenging the Redevelopment Authority's right to condemn the property at issue in this case. The Circuit Court for Milwaukee County, William J. Haese, Judge, granted summary judgment to the Redevelopment Authority. The court of appeals affirmed the circuit court in an unpublished decision. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee*, No. 01AP1642, unpublished slip op. (Wis. Ct. App. Feb. 12, 2002).

In August 2001, the Redevelopment Authority applied for a writ of assistance to evict the VFW from the property. The Circuit Court for Milwaukee County, Maxine A. White, Judge, granted the application. The VFW appealed to the court of appeals, but

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state the facts and refer to prior proceedings as relevant to the issue on review.

¶12 The VFW owned a parcel of real property situated at 2601 West Wisconsin Avenue in the City of Milwaukee that is the subject of the condemnation. It used this property as its headquarters. In 1961, the VFW conveyed the real estate (land and improvements) to Towne Metropolitan, Inc., which built an 11-story, 113,000-square-foot hotel on the land.

¶13 In exchange for conveying the real estate, the VFW obtained a 99-year lease for 5,250 square feet on the hotel's ground floor, was amounting to 4.6 percent of the building. The lease provided that the VFW's space in the hotel would be designed for the VFW's purposes and that all leasehold improvements and equipment would be furnished by the lessor. It further provided that the lessor would pay all real

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in the interim a different circuit court judge approved an order requiring the Redevelopment Authority to raze the building at 2601 West Wisconsin Avenue. The court of appeals concluded that the VFW's challenge to the writ of assistance had become moot by virtue of the raze order. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee,* Nos. 02AP1035, 02AP1880, unpublished slip op. (Wis. Ct. App. Sept. 30, 2003).

In April 2003, the VFW filed a claim for relocation benefits under chapter 32 of the Wisconsin Statutes. The Circuit Court for Milwaukee County, Francis T. Wasielewski, Judge, dismissed the claim. The court of appeals affirmed in an unpublished decision. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee,* No. 2004AP3266, unpublished slip op. (Wis. Ct. App. Feb. 14, 2006).

estate taxes and would provide heat, air conditioning, maintenance, and periodic redecoration at no cost to the VFW. The lease obligated the VFW to pay an annual rent of only $1 and was renewable for a second 99-year term at the VFW's option.

¶14 Under the lease, the VFW was vulnerable, however, to complete loss. The lease was subordinate to any mortgage against the building, allowing a lender to foreclose and wipe out the lease. The VFW's interest reverted to the lessor when the VFW ceased to occupy the building. The lessor had no duty to assure that in the event of eminent domain the building would have adequate value to compensate the VFW for the value of its lease. The lease was silent regarding allocation of the proceeds of condemnation.

¶15 Towne Metropolitan sold the real estate in 1986 to Marquette University, which used the hotel as a dormitory. In 1994, Marquette University sold the real estate to Maharishi Vedic University for $600,000. With each sale of the property, the VFW's lease was assigned to the new owner, who had the responsibility of complying with the VFW's lease. Maharishi Vedic University never occupied the hotel after purchasing it but continued to provide utilities and maintenance for the VFW's space.

¶16 Although the premises rented by the VFW apparently remained in habitable condition, by the 1990s the hotel as a whole had deteriorated, along with the surrounding neighborhood. In February 1998, the Redevelopment Authority held a public

hearing to consider creating a redevelopment district in an area including the real estate at 2601 West Wisconsin Avenue. In January 1999 the Redevelopment Authority created a redevelopment district and issued a relocation order. The Department of Commerce approved the Redevelopment Authority's relocation plan in May 1999.

¶17 In January 2001, the Redevelopment Authority issued a jurisdictional offer to purchase the real estate at 2601 West Wisconsin Avenue, including the hotel and any other improvements, as well as an adjoining parking lot owned exclusively by Maharishi Vedic University. After locating comparable properties, the Redevelopment Authority made a jurisdictional offer in the amount of $440,000 as compensation for (1) land and improvements (with the VFW and Maharishi Vedic University as owners), (2) personal property in the hotel owned by Maharishi Vedic University, and (3) an adjoining parking lot owned solely by Maharishi Vedic University.[7]

¶18 At the date of taking the only occupant of the building was the VFW; it was not legally

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[7] The VFW rhetorically asked the circuit court why the Redevelopment Authority would offer more than $0 when the property had no value. The circuit court opined that the Redevelopment Authority might have wanted to avoid litigation and litigation expenses and to facilitate timely occupancy.

permissible to use the rest of the building because of the many building code violations.[8]

¶19 The Redevelopment Authority filed a $440,000 award of damages with the clerk of courts for Milwaukee County in February 2001. The Circuit Court for Milwaukee County, Michael P. Sullivan, Judge, divided the $440,000 award between the VFW and Maharishi Vedic University. The VFW received $300,000, less taxes owing. Maharishi Vedic University received $140,000, less taxes owing.

¶20 The VFW appealed the adequacy of the award to the Condemnation Commission in February 2002. Maharishi Vedic University did not join in the appeal. The Condemnation Commission requested instruction from the circuit court about how to value the property. The Circuit Court for Milwaukee County, Michael P. Sullivan, Judge, ordered the Condemnation Commission to determine the value of the property for just compensation according to the unit rule.[9]

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[8] The VFW remained in the building after condemnation until April 9, 2003, when it was evicted. The City Department of Neighborhood Services issued a raze order in March 2003. The building was razed and, according to the briefs, the land remains vacant.

[9] The VFW petitioned for leave to appeal this determination. The court of appeals granted the petition and concluded that the unit rule should be used by the Condemnation Commission. The court of appeals, however, declined to address the state constitutional issue of just compensation. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v.*

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The Commission determined that the Redevelopment Authority was obligated to pay $425,000 in compensation – $15,000 less than the Redevelopment Authority had provided in its award.

¶21 The VFW appealed the decision of the Condemnation Commission to the Circuit Court for Milwaukee County. In a pretrial motion, the VFW urged the circuit court not to apply the unit rule when determining the amount of just compensation. The VFW argued that under the circumstances of the present case, application of the unit rule would violate Article I, Section 13 of the Wisconsin Constitution.

¶22 The VFW contended that its leasehold interest was extremely valuable because the rent was only $1 per year. One estimate was that the value of the leasehold to the VFW was approximately $50,000 a year. The VFW's appraiser estimated the fair market value of the VFW's leasehold interest at the date of taking, reduced to present value, as approximately $1,200,000, an amount "sufficient to build a facility with 5,250 square feet and maintain it without occupancy costs over the remaining period of the lease."[10] The VFW also argued that it should not be

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Redev. Auth. of Milwaukee, Nos. 2002AP1035, 2002AP1880, unpublished slip op. (Wis. Ct. App. Sept. 30, 2003).

[10] The VFW again asserts in its brief to this court that the value of its leasehold interest was approximately $1,200,000. As it did in its brief to the circuit court, the VFW also states that this amount is "sufficient to permit the VFW to build a facility

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obligated to prove the value of the building that it did not own and did not have an obligation to maintain.

¶23 The circuit court (Michael D. Guolee, Judge) denied the VFW's motion seeking that the unit rule not be used, holding that just compensation would be calculated according to the unit rule. The matter then went to a jury trial for a determination of the fair market value of the property taken by the Redevelopment Authority.

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with 5,250 square feet and maintain it without occupancy costs over the remaining years in the initial term of the lease." Brief and Appendix of the City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States Plaintiff-Appellant at 13-14.

It is not clear that the VFW is employing the proper approach for valuing its leasehold interest. "A leasehold is normally valued as the difference between the rental value of the premises at the time of taking and the rent due the lessors during the unexpired term." *Maxey*, 94 Wis. 2d at 401, 288 N.W.2d 794. The VFW seems to present a valuation equaling the amount that it would cost the VFW to build and maintain an entirely new substitute facility, rather than a valuation equaling the difference between the rental value of the actual premises rented by the VFW and the rent that the VFW owed under the lease.

Nevertheless, we accept for purposes of our review the VFW's contention that its leasehold interest had value. Although the premises rented by the VFW presumably had a depressed rental value by virtue of their location within a vacant and deteriorating building that apparently could not be put to any profitable use, it seems plausible that the rental value of the premises exceeded the rent of $1 per year.

¶24 The Redevelopment Authority and the VFW both presented professional appraisers who testified at trial regarding the value of the property. The appraisers also submitted written reports that were introduced as evidence.[11]

¶25 The appraisers agreed that a buyer could not extract value from the property by demolishing the hotel structure and starting over with vacant land. The Redevelopment Authority's appraiser testified that the land would be worth about $285,000 if vacant and that it would cost more than $1,000,000 to demolish the hotel building, including $864,000 for asbestos removal. The VFW's appraiser agreed that the land would be worth about $300,000 if vacant, that demolishing the building would mean spending about $850,000 on asbestos removal, and that a prospective owner likely would not be interested in tearing the building down.

¶26 The appraisers disagreed, however, about whether the property could yield value if the hotel structure were renovated for some use.

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[11] Each appraiser made clear in his written report that he appraised the value of the entire parcel of property, including the hotel structure and the land underneath it. The VFW's appraiser stated that his appraisal considered "the overall value of the entire property, including the Hotel, parking structure and vacant lot." The Redevelopment Authority's appraiser stated that he had appraised the "land, site improvement and building improvements."

¶27 The Redevelopment Authority's appraiser testified that it would not be financially feasible to put the hotel building to any use. He specifically concluded that it would not be financially feasible to renovate the hotel building for use as a retail outlet, an office building, an apartment building, a dormitory, an educational facility, a subsidized housing unit, a full-service hotel, or a limited-service hotel. He concluded that when put to each use, the land and hotel structure would have a negative value because the cost of necessary renovations would outweigh any profits that the property could be expected to yield.

¶28 The VFW's appraiser testified that the hotel building could be renovated and put to a use falling within the "general residential" category. His testimony and written report suggested that the building could be renovated and used as an apartment complex, a housing complex for the elderly, a homeless shelter, a mental health facility, a halfway house, or a limited-service hotel. The VFW's appraiser admitted, however, that he had not determined whether any of his proposed uses would be financially feasible.

¶29 The appraisers provided dramatically different estimates of the property's total worth. The Redevelopment Authority's appraiser testified that the property had zero market value, because a buyer would be unable to make any money with the property either by razing or renovating the hotel building. The VFW's appraiser fixed the property's value at approximately $1,800,000.

¶30 The parties also disagreed about the assessed value of the property for property tax purposes at the time of the taking. The VFW asserted that the assessed value was $566,000. The Redevelopment Authority contended that the assessed value was $1,000. The circuit court concluded that the latter figure was the correct assessed value at the time of the taking.

¶31 The circuit court instructed the jury to determine the fair market value of the land and building according to the unit rule as follows:

> The entirety of 2601 West Wisconsin Avenue must be valued as a whole unit and a single entity with all of its square footage as of [the date of taking] as if owned by only one owner and as if not leased.

¶32 The special verdict required the jury to answer a single question: "What was the fair market value of the entire property located at 2601 West Wisconsin Avenue, in the City and County of Milwaukee, as a whole unit and single entity, with all its square footage, on February 28, 2001, in the condition of the property on that date?" The jury answered: $0.

¶33 The circuit court (Elsa C. Lamelas, Judge) rendered a judgment consistent with the jury's verdict. The judgment required the VFW to return the $300,000 award that it previously had received from the Redevelopment Authority and to pay $87,348 in interest and statutory costs. The VFW contends that

"this is the wors[t] abuse of condemnation powers ever recorded in the State of Wisconsin."[12]

II

¶34 Article I, Section 13 of the Wisconsin Constitution provides in full that "[t]he property of no person shall be taken for public use without just compensation therefor."[13]

¶35 The text of this provision of the Wisconsin Constitution is substantially similar to the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that private property shall not "be taken for public use, without just

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[12] Brief and Appendix of the City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States at 28.

[13] The parties briefly touch upon the statutes but concentrate on interpreting the constitution. Various statutes define "property" as including estates in land and require valuation of the fair market value of the entire property taken. *See* Wis. Stat. § 32.01(2) and § 32.05(9)(a). The condemnor is required to pay "fair market value of the property taken." Wis. Stat. § 32.09(5)(a). The condemning authority is required to issue only one award for just compensation that names "all persons having an interest of record in the property taken and may name other persons," with apportionment made by the circuit court if there is a dispute. *See* Wis. Stat. §§ 32.05(7)(a), (d); 32.05(9)(a)1.-3.

Wisconsin Stat. § 32.09(5)(a) provides as follows:

> In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 [relating to additional items payables] if shown to exist.

compensation."[14] Accordingly, when interpreting and applying Article I, Section 13 of the Wisconsin Constitution, this court long has sought guidance in decisions based on the federal Takings Clause or on analogues in the constitutions of other states.[15]

¶36 It is undisputed that the Redevelopment Authority has taken the VFW's property for public use and is obligated to provide just compensation therefor. Although the VFW held only a leasehold interest in the real estate taken, the court held in *Maxey v. Redevelopment Authority of Racine*, 94 Wis. 2d 375, 400, 404, 288 N.W.2d 794 (1980), that under ordinary circumstances a lessee with a lease for more than one year has a property interest and is entitled to some portion of a condemnation award. The court stated that "[i]t is well settled that a lessee has a property interest; and, when that interest is completely taken by a condemning authority, the lessee is entitled to compensation."[16]

¶37 The question in the present case is what amount of compensation is "just" within the meaning

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[14] The Fifth Amendment Takings Clause is applicable to the states under the Fourteenth Amendment. *See Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

[15] *See, e.g., Maxey*, 94 Wis. 2d at 396-99; *Luber v. Milwaukee County*, 47 Wis. 2d 271, 277-78, 177 N.W.2d 380 (1970); *Randall v. City of Milwaukee*, 212 Wis. 374, 382, 249 N.W. 73 (1933); *State ex rel. Carter v. Harper*, 182 Wis. 148, 153-54, 196 N.W. 451 (1923).

[16] *Maxey*, 94 Wis. 2d at 400.

of Article I, Section 13. Answering this question requires us to interpret a provision of the state constitution, which we do independently of the circuit court and court of appeals, although benefiting from their analyses.[17]

¶38 The constitutional requirement of just compensation cannot be reduced to a formula or expressed in inexorable rules.[18] The requirement of just compensation "derives as much content from the basic equitable principles of fairness, as it does from technical concepts of property law."[19] Courts have determined just compensation according to practical rules that work substantial justice in the ordinary case but may be subject to exception when warranted by the circumstances.[20]

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[17] *State v. Schweda*, 2007 WI 100, ¶12, 303 Wis. 2d 353, 736 N.W.2d 49.

[18] *See United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949) ("Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules."); *United States v. Cors*, 337 U.S. 325, 332 (1949) ("The Court in its construction of the constitutional provision has been careful not to reduce the concept of 'just compensation' to a formula.").

[19] *United States v. Fuller*, 409 U.S. 488, 490 (1973) (internal citation omitted).

[20] *Cors*, 337 U.S. at 332 ("The Court in an endeavor to find working rules that will do substantial justice has adopted practical standards. . . ."); *United States v. Miller*, 317 U.S. 369, 375 (1943) ("Courts have had to adopt working rules in order to do substantial justice in eminent domain proceedings.").

¶39 The "unit rule" – sometimes called the "undivided fee rule" – is one of these practical rules. As we have stated, under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property.[21] When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest.[22] Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for

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[21] *Green Bay Broad. Co. v. Redev. Auth.*, 116 Wis. 2d 1, 12, 342 N.W.2d 27 (1983).

This court modified the *Green Bay Broadcasting* opinion on a motion for reconsideration. *See* 119 Wis. 2d 251, 349 N.W.2d 478 (1984). The modifications are not germane to the issue presently on review.

[22] *Maxey*, 94 Wis. 2d at 401 ("[C]ondemnation awards should be based on the value of the property as a whole as if there were only one owner, and it is only after there is a determination of the taken property's total value that it is apportioned among the various interests in the property."); 4 Nichols, *supra* note 3, § 13.01[16] (stating that the unit rule applies "when there are different interests or estates in the property acquired by condemnation" and that "[p]ursuant to the unit rule, the proper course is to determine the entire compensation to be awarded as though the property belonged to one person and then apportion this sum among the different parties according to their respective rights").

the property taken and the payment is then apportioned among the various owners.[23]

¶40 That property is valued as an integrated and comprehensive unit does not mean that the individual components of value may not be examined or considered in arriving at an overall fair market value.[24] "The unit rule requires only that the various components be valued as contributing parts of an organic whole."[25]

¶41 In Wisconsin jurisprudence, "acceptance [of the unit rule] is beyond question."[26] Indeed the unit rule is accepted in the majority of American jurisdictions.[27] The unit rule is a carefully guarded rule

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[23] 4 Nichols, *supra* note 3, § 12.05[1] ("The public pays what the land is worth, and the amount so paid is to be divided among the various claimants, according to the nature of their respective elements."); *Green Bay Broad. Co.*, 116 Wis. 2d at 11 (same; quoting *Nichols on Eminent Domain*).

[24] *Milwaukee & Suburban Transp. Corp. v. Milwaukee County*, 82 Wis. 2d 420, 449-50, 263 N.W.2d 503 (1978). *See also United States v. 6.45 Acres of Land*, 409 F.3d 139, 147 (3d Cir. 2005).

[25] *Milwaukee & Suburban Transp. Corp.*, 82 Wis. 2d at 449-50.

[26] *Green Bay Broad. Co.*, 116 Wis. 2d at 11 (citing *Milwaukee & Suburban Transp. Corp.*, 82 Wis. 2d at 448. *See also Hoekstra v. Guardian Pipeline, LLC*, 2006 WI App 245, ¶ 5, 726 N.W.2d 648; *Appleton Water Works Co. v. R.R. Comm'n of Wis.*, 154 Wis. 121, 142 N.W. 476 (1913).

[27] Johnston, *supra* note 5, at 302.

and only in rare and exceptional situations are departures permitted.[28]

¶42 The VFW contends that this court must make an exception to the unit rule in the present case in order to avoid a grossly unjust result.

¶43 The VFW argues that under the unit rule the VFW will not be compensated for the loss of its valuable leasehold interest because the value of its leasehold interest exceeds the zero value of an undivided interest in the condemned property. According to the VFW, the unit rule should not be applied when payment equaling the value of an undivided interest in condemned property is insufficient to fully compensate owners holding partial interests in the property.[29]

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[28] *Nebraska v. United States*, 164 F.2d 866, 869 (8th Cir. 1947).

For a general discussion of cases determining just compensation for the condemnation of property held in different estates or interests, *see Are Different Estates or Interests in Real Property Taken Under Eminent Domain to Be Valued Separately, or Is Entire Property to Be Valued as a Unit and the Amount Apportioned Among Separate Interests*, 69 A.L.R. 1263 (1930) (supplemented by 166 A.L.R. 1211).

For a general discussion of cases determining the compensation due to a lessee for the taking or damaging of a leasehold interest in property, *see Eminent Domain: Measure and Elements of Lessee's Compensation for Condemnor's Taking or Damaging of Leasehold*, 17 A.L.R. 4th 337 (1982).

[29] *See, e.g.*, Brief and Appendix of the City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States Redevelopment Authority-Appellant at 15 ("[T]he 'unit rule' may

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¶44 The court of appeals agreed with the VFW, concluding that the necessities of the instant case require an exception to the unit rule. According to the court of appeals, the particular circumstances leading to the conclusion that application of the unit rule amounts to an unconstitutional taking, and that the VFW must be afforded an opportunity to prove the value of its leasehold interest, are that the leasehold was a long-term lease; that the lease did not include a forfeiture provision upon condemnation; and that the fair market value of the property was found to be zero. The court of appeals seemed to conclude as a matter of public policy that when the fair market value of the condemned property is zero, awarding a lessee zero dollars upon condemnation would be a manifest injustice. The court of appeals remanded the cause to the circuit court to value the VFW's separate leasehold interest and to allow the VFW to recover something more than the VFW's share of the fair market value of the condemned property. The court of appeals decision is based on equitable principles of fairness to the VFW.

¶45 Several courts in other states have, as the VFW urges, departed from the unit rule when the aggregate value of partial interests in the condemned property exceeds the value of an undivided interest. In such cases, these courts apply what commentators

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be utilized provided that [it does] not deprive a tenant of its right to be fully compensated for the value of its leasehold.").

call the rule of "separate" or "independent" valuation.[30] Application of this rule indemnifies each of the several owners. The condemnor pays each of the several owners the fair market value of his, her, or its property interest even though the total amount paid exceeds the fair market value of the property as if owned by a single owner.[31]

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[30] *See* 4 Nichols, *supra* note 3, § 12.05[2] (contrasting the "rule of separate valuation" to the unit rule (also sometimes referred to as the undivided fee rule)); Johnston, *supra* note 5, at 310-19 (contrasting the rule of "independent valuation of divided interests" to the unit rule; arguing that the independent valuation rule is consistent with the position that condemnors must indemnify property owners in order to provide just compensation).

[31] *See, e.g., City of Baltimore v. Latrobe,* 61 A. 203, 206 (Md. 1905) ("We say that because each is entitled under the Constitution to be compensated in damages for the amount of his interest taken, and, if it be true that the values of the two interests are more than what the lots would be worth if owned by one person, the necessities of the case require an apparent exception to the general rule . . . as to what the condemning party must pay."); *State ex rel. McCaskill v. Hall,* 28 S.W.2d 80, 82 (Mo. 1930) ("There may be instances in which, owing to exceptional circumstances, the damages to the various interests when added together exceed the value of the property as a whole; in such case the particular interests should of course be separately appraised, because the owner of each is entitled to be compensated in damages for the amount of his interest taken." (citing *Latrobe*)); *State v. Platte Valley Pub. Power & Irrigation Dist.,* 23 N.W.2d 300, 307-08 (Neb. 1946) ("The measure of compensation to each owner must be that which he has lost. . . . [T]hose courts which have held that the sum of the separate values of the divided interests may not exceed the value of the unencumbered whole have at that point abandoned the rule that the measure is what has the owner lost, and applied the rule that the measure

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¶46 In contrast, an equal or greater number of courts do not depart from the unit rule when the aggregate value of partial interests in property exceeds the fair market value of an undivided interest.[32]

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is what has the taker gained."); *Wilson v. Fleming*, 239 Iowa 718, 31 N.W.2d 393, 401-02 (Iowa 1948) (adopting *Platte Valley Pub. Power & Irrigation Dist.*); *People ex rel. Dep't of Pub. Works v. Lynbar, Inc.*, 253 Cal. App. 2d 870, 879 (Cal. App. 1967) ("The question to be answered in this case is, of what does the whole really consist, for which payment is to be made by the condemnor in one lump sum . . . ? It seems to us that this whole must be the total of what the various involuntary sellers have to sell and not the undivided fee which the condemnor is seeking to acquire."); *State Highway Dep't v. Thomas*, 154 S.E.2d 812, 816 (Ga. Ct. App. 1967) ("[W]here there are separate interests to be condemned, the jury, in arriving at just and adequate compensation, is not only authorized but required to consider the value which the thing taken has to the respective owners of the interests being condemned. If just and adequate compensation to the owners of the various interests in the land being condemned requires that the total compensation exceed the value of the land, this presents no difficulty. . . .").

See also 4 Nichols, *supra* note 3, § 12.05[2] ("It has . . . been intimated that where the undivided fee rule operates to the prejudice of the interest of the condemnee it might be considered unconstitutional." (citing *Latrobe*)).

[32] *See, e.g., United States v. 6.45 Acres of Land*, 409 F.3d 139, 141, 147-49 (3d Cir. 2005) (agreeing with the United States that the district court had erred in failing to apply the unit rule; concluding that the district court's error was not harmless because it was "quite likely that the sum of the District Court's independent awards – its assessment of 'the value of the separate interests' – substantially exceeded the value of the whole"); *United States v. 131.68 Acres of Land*, 695 F.2d 872, 975 (5th Cir. 1983) ("[T]he division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of the fee."); *Nebraska v. United States*,

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164 F.2d 866, 868 (8th Cir. 1947) ("The [unit] rule manifestly is not without hardships in practical operation, but nevertheless the guarantee of the Fifth Amendment is regarded as being satisfied generally where the cash value of property taken in fee is substituted for it and the cash is allocated or apportioned among the respective estates or interests on the basis of their relative values."); *County of Clark v. Sun State Props., Ltd.*, 2 P.3d 954, 958-60 (Nev. 2003) (stating that under the undivided-fee rule, "the division of a fee into separate interests cannot increase the amount of compensation that the condemnor has to pay for the taking of the fee"; concluding that a Nevada statute codified the undivided fee rule, which is consistent with the constitution); *Harco Drug, Inc. v. Notsla, Inc.*, 382 So.2d 1, 6 (Ala. 1980) ("The total award stands in place of the land, and the owners of each interest may recover out of the award the same proportionate interest which they had in the land condemned. . . . [W]here, as appears to be the case here, the total award is inadequate to fully compensate both the lessee and lessor, the inadequacy, or loss, must be shared by both the lessee and lessor according to their proportionate interests in the estate."); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964) ("Undoubtedly, defendant city should only have to pay the value of the land appropriated, even though that value may be less than the aggregate values of the interests in that land."); *State Highway Comm'n v. Burk*, 265 P.2d 783, 798-800 (Or. 1954) (holding that although the constitution may not require the valuation of condemned property to be in a lump sum, "[t]he very great weight of authority establishes that the constitution permits valuation in that manner"; refusing to recognize "any rule that the separate amounts apportioned to the owners of different interests may exceed the market value of the whole"); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911) ("[N]o contracts between the owners of different interests in the land can affect the right of the government to take the land for public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole." (citation omitted)); *J.J. Newberry Co. v. City of E. Chicago*, 441 N.E.2d 39, 43 (Ind. Ct. App. 1982) ("Newberry cites several cases from other jurisdictions in support of

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The rationale for applying the unit rule under these circumstances is that the condemnor, representing the public, should not pay a total sum to all the owners that exceeds the total fair market value of the property were the property held by one person.

¶47 In *Green Bay Broadcasting Co. v. Redevelopment Authority of Green Bay,* 116 Wis. 2d 1, 342 N.W.2d 27 (1983), we stated that although partial owners are constitutionally entitled to just compensation, "contracts between the owners of different interests in the land *should not be permitted to result in a total sum which is in excess of the whole value of the*

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the proposition that the combined value of a leasehold interest and a reversionary interest may exceed the fair market value of the property as a whole. However, this Court need look no further than the unambiguous directives of the Indiana Supreme Court which stated: 'For the purposes of condemnation proceedings, the value of all the interests or estates in a single parcel of land cannot exceed the value of the property as a whole, and that when the value of the property as a unit is paid to the various owners, or into court for them, the constitutional requirements are fully met. . . .'" (quoting *State v. Montgomery Circuit Court,* 157 N.E.2d 577, 578 (Ind. 1959))); *New Jersey Sports & Exposition Auth. v. Borough of E. Rutherford,* 348 A.2d 825, 829-30 (N.J. App. 1975) (noting that some jurisdictions recognize an exception to the unit rule "when the aggregate value of the separate interests exceeds the value of the unencumbered fee"; holding that the New Jersey courts do not recognize such an exception); *Frankfurt v. Texas Turnpike Auth.,* 311 S.W.2d 261, 267 (Tex. Ct. App. 1958) ("[T]he value of the property taken is all that the condemnor must pay, and this value cannot be increased by any contracts or distribution among the different persons owning interests in it; . . . the sum of all the parts can not exceed the whole.").

undivided fee."[33] This language in the *Green Bay Broadcasting* decision cannot be reconciled with the VFW's position that compensation should be awarded for the taking of its leasehold interest when the undivided property has no value. *Green Bay Broadcasting* is also inconsistent with the cases from other states holding that the condemnor must provide compensation sufficient to indemnify each partial owner of real property even when the total paid exceeds the fair market value of the undivided property. *Green Bay Broadcasting* is consistent with the cases from many other jurisdictions holding that the unit rule should be applied even when the aggregate fair market value of partial interests in property exceeds the total value of an undivided interest.

¶48 The VFW implicitly invites this court to reconsider the analysis in *Green Bay Broadcasting* and to withdraw language relating to the unit rule from that opinion. The court of appeals, which held in the VFW's favor, discussed *Green Bay Broadcasting* but did not discuss the relevant language we set forth above.[34]

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[33] *Green Bay Broad. Co. v. Redev. Auth. of Green Bay*, 116 Wis. 2d 1, 11, 342 N.W.2d 27 (1983) (emphasis added).

[34] *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee*, 2008 WI App 24, ¶ 15, 307 Wis. 2d 518, 746 N.W.2d 536.

¶49 Courts should not apply the unit rule robotically as Stepford judges.[35] Departure from the unit rule may be made in rare and exceptional circumstances. The instant case, however, does not present a rare and exceptional situation justifying departure from the unit rule set forth in *Green Bay Broadcasting*.[36] Many cases have applied the unit rule to condemnation of the lessor's and lessee's interests. We follow the unit rule in the present case for several reasons.

¶50 First, the unit rule stated in *Green Bay Broadcasting* protects the interests of both the public and the private property owners in the instant case. It comports with the principle that just compensation "means a compensation that would be just in regard

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[35] See Ira Levin, *The Stepford Wives* (1972), in which robots are preferred to human beings.

[36] The dissent incorrectly asserts that this court has recognized exceptions to the unit rule in *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970); *Maxey v. Redev. Auth. of Racine*, 94 Wis. 2d 375, 288 N.W.2d 794 (1980); and *Green Bay Redev. Auth. v. Bee Frank, Inc.*, 120 Wis. 2d 402, 355 N.W.2d 240 (1984). *See* dissent, ¶¶112-120.

The *Luber* decision relates to an owner's loss of rental income resulting from an impending taking and does not mention the unit rule. *Maxey* held in relevant part that a lessee of property may be entitled to compensation in a takings case and that just compensation is determined according to the unit rule. *See Maxey*, 94 Wis. 2d at 400-01. The *Bee Frank* case held that the unit rule is not applicable "in determining entitlement to litigation expenses [under Wis. Stat. § 32.28(3)]," *Bee Frank*, 120 Wis. 2d at 414, and did not address the manner of determining just compensation under the constitution.

to the public, as well as in regard to the individual. . . ."[37]

¶51 Under the unit rule, the public pays the full value of the property that it takes but is not required to pay excess value attributable to contracts between the owners of different interests in the property.[38]

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[37] *Bauman v. Ross*, 167 U.S. 548, 570 (1897). *See also United States v. 564.54 Acres of Land*, 441 U.S. 506, 512 (1979) (stating that question of just compensation as follows: "What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?") (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)).

[38] *See Green Bay Broad. Co. v. Redev. Auth. of Green Bay*, 116 Wis. 2d 1, 11, 342 N.W.2d 27 (1983) ("[W]hen a tract of land is taken by eminent domain, as the land itself is taken by a paramount title rather than the separate estates of different persons having interests in the land, the compensation awarded is for the land itself. . . . The public pays what the land is worth. . . ." (quoting *Nichols on Eminent Domain*)); *United States v. 499.472 Acres of Land*, 701 F.2d 545, 549 (5th Cir. 1983) (stating that the unit rule is "[c]onsistent with th[e] theory . . . that the government should not have to pay more for the property than it is worth").

See also Walgreen Co. v. City of Madison, 2008 WI 80, ¶48, 311 Wis. 2d 158, 752 N.W.2d 687 (explaining that when the value of land is assessed for tax purposes, "[a] lease never increases the market value of real property rights to the fee simple estate. Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though the rights may legally 'run with the land,' they constitute contract rather than real property rights." (quoting Appraisal Institute, *The Appraisal of Real Estate* 473 (12th ed. 2001))).

Because eminent domain terminates leases,[39] the entire fee simple estate (as if not leased) is what the condemnor is purchasing. The fee simple estate is valued under the unit rule. This valuation equitably balances property owners' interest in receiving compensation against the public's interest in paying a fair, reasonable amount for property acquired by eminent domain.

¶52 Second, the "fairness award" doctrine adopted by the court of appeals conflicts with the principle that damages lacking a direct relationship to the fair market value are incidental or consequential damages and are not considered when determining just compensation under the constitution.[40] Under the court of appeals' decision, if the fair market value of the property in condemnation is not enough to pay the lessee, the condemnor must pay more for the property than it is worth. The result of the fairness award doctrine is that the condemnor

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[39] *See Wis. Mall Props., LLC v. Younkers, Inc.*, 2006 WI 95, ¶26, 293 Wis. 2d 573, 717 N.W.2d 703 ("[C]omplete condemnation of a property terminates a lease attached to that property.").

[40] Consequential or incidental damages are excluded from eminent domain valuation cases. *See, e.g., Rotter v. Milwaukee County Expressway & Transp. Comm'n*, 72 Wis. 2d 553, 562-63, 241 N.W.2d 440 (1976); *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, ¶17 n.16, ¶21, 302 Wis. 2d 599, 734 N.W.2d 428 (Roggensack, J., lead op.).

See also United States v. Petty Motor Co., 327 U.S. 372, 377-78 (1946) ("[E]vidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings.").

becomes a guarantor of a private lease in low-to-no-value leased property. In the present case, the condemnor would be insuring the VFW's sale-leaseback business deal that has gone bad. In other words, under the fairness doctrine, the condemnor becomes liable to the lessee for consequential, incidental damages associated with the termination of the lease, above and beyond the fair market value of the property. Such a bailout by the condemnor is not authorized by statute and is not required by the state constitution.

¶53 Third, the court of appeals' "fairness award" doctrine is at odds with *Walgreen Co. v. City of Madison,* 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687. In *Walgreen,* this court held that for purposes of determining the fair market value of that real estate for property-tax-assessment purposes, a lease favorable to the lessor did not increase the market value of the fee simple estate.[41] The *Walgreen* court declared that a business arrangement extraneous to the lease but built into the rental agreement reflects a business-contractual arrangement, not real property value.[42]

¶54 In the instant case, VFW's lease is a lease unfavorable to the lessor. The VFW refers to the lease as a "negative lease" because it "encumbers rather

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[41] *Walgreen Co.*, 311 Wis 2d 158, ¶3.

[42] *Id.*, ¶¶65-66.

than enhances the value of the fee."[43] When the negative lease is relatively long and rental values have substantially increased since the beginning of the lease term, the lessee's share of a condemnation award may exhaust the entire award. *Maxey*, 94 Wis. 2d at 401. *Maxey* does not, however, support abandonment of the unit rule.

¶55 The VFW's negative lease does not present a usual negative lease. The VFW lease, like the Walgreen lease, reflects a business arrangement. The VFW's sweetheart sale-and-leaseback business arrangement reflects a business-contractual arrangement, and according to *Walgreen*, should not be considered in determining the fair market value of the fee simple estate.

¶56 The court of appeals decision would change Wisconsin law so that a lessor's separate real property interest and the lessee's separate leasehold interest would be valued separately for condemnation purposes. Such an approach ignores the fact that the unit rule and the statutes and case law providing for

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[43] Brief and Appendix of the City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States Plaintiff-Appellant at 16.

See also Walgreen Co., 311 Wis. 2d 158, ¶97 n.9 (Abrahamson, C.J., concurring) ("If the rent and/or terms of the lease are favorable to the tenant (or lessee), the value of the leased fee interest will usually be less than the value of the fee simple interest, resulting in a positive leasehold interest." (quoting Appraisal Institute, *The Appraisal of Real Estate* 82 (12th ed. 2001))).

the valuation of the fair market value of a fee simple interest in real property; ignores the fact that in condemnation proceedings a lease is terminated and the lessor and lessee allocate the sum paid for the total fee estate unless the lease provides otherwise; and ignores the fact that a business-contractual arrangement between the parties built into the rental agreement does not get valued in calculating the fair market value of the condemned property.

¶57 Fourth, although the unit rule admittedly may leave a lessee vulnerable to injury when the lessor fails – as the lessors in the present case apparently failed – to maintain property in a valuable state prior to a condemnation, a lessee may obtain by contract the protections not afforded by the constitution.

¶58 Although "complete condemnation of a property terminates a lease attached to that property,"[44] the lessee and lessor nevertheless "may contract for their rights and obligations in the event of condemnation."[45] Furthermore, "[t]he termination of a

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[44] *Wis. Mall Props.*, 293 Wis. 2d 573, ¶26.

[45] *Id.*

In *Maxey*, 94 Wis. 2d at 383, although the lease between Maxey and the lessors provided that Maxey's interest in the lease terminated upon the taking of the property, the court concluded that the lease provision terminated the liabilities of the lessor and lessee but did not forfeit Maxey's right to share in the compensation award. A lease may bar a lessee from sharing in the proceeds of a condemnation award. Such a condemnation clause is a negotiated apportionment of a risk between a lessor

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lease would not ordinarily be expected to extinguish an existing cause of action for a breach of the lease."[46] Contract law offers tools with which a lessee may guard against injury resulting from the lessor's failure to maintain the property prior to a condemnation.[47]

¶59 The VFW protests that it *did* commence an action against the lessors for breach of the lease agreement in the present case. According to the VFW, that action was dismissed on the ground that the VFW lost the right to sue the lessors once the property had been condemned. During oral argument to this court, counsel for the VFW contended that the Redevelopment Authority's actions condemning the property cut off the VFW's ability to recover from the lessors who allegedly had violated the lease in allowing the property to deteriorate. Counsel for the VFW argued as follows:

> If the [Redevelopment Authority] wants to apply the unit rule, that's fine – just so long as the [VFW] retains the right to sue the defaulting lessor. But there's a combination

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and a lessee. *Van Asten v. Dep't of Transp.*, 214 Wis. 2d 135, 138, 571 N.W.2d 420 (Ct. App. 1997).

[46] *Wis. Mall Props.*, 293 Wis. 2d 573, ¶34.

[47] *See Wis. Mall Props.*, 293 Wis. 2d 573, ¶30, 717 N.W.2d 703 ("[M]ost conflicts that condemnation imposes on the landlord and tenant can be avoided by proper planning. In this regard, the most important tool is educated negotiation and drafting of the lease contract." (quoting 7A *Nichols on Eminent Domain* § 11.06[1][a])).

> of rules here. There's the unit rule, and then the rule that in condemnation, the condemnation terminates the obligations between the lessor and the lessee. [The circuit court] dismissed [the VFW's] case [against the lessors]. . . . I invite you to examine that record carefully, because it is true that a strict application of the unit rule is acceptable just so long as you don't enforce the collateral rule which prevents the lessee (in this case) from suing the lessor for an obvious breach of lease. But that happened in this case.

¶60 The VFW's account of its prior lawsuit against the lessors, however, does not tell the full story. The circuit court did not dismiss the VFW's action against the lessors on the basis stated by the VFW.

¶61 The VFW filed a complaint against all three lessors (Towne Metropolitan, Marquette University, and Maharishi Vedic University), alleging that they had "breached the lease obligation to maintain the property in a condition so that it will have a value on February 28, 2001 [the date of the condemnation] of an amount sufficient to compensate the VFW for the value of its leasehold."[45] The court of

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[45] *Milwaukee City Post # 2874 Veterans of Foreign Wars of the U.S. v. Maharishi Vedic University, Inc.*, No. 2006AP1039, unpublished slip op., ¶5 (Wis. Ct. App. March 1, 2007).

The court of appeals' decision in this unpublished case constitutes a fact that the Redevelopment Authority contends is

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appeals concluded that the VFW's complaint did not state a claim upon which relief could be granted, because the lease did not contain the provision that the VFW, in its complaint, accused the lessors of breaching.[49] The court of appeals refused to consider the argument that the VFW made on appeal (but not in the circuit court) that the lessor had an obligation under the lease to maintain the hotel building and that Maharishi Vedic University breached this obligation, causing the condemnation.[50]

¶62 The court of appeals in that case explicitly declined to determine whether the condemnation had affected the VFW's right to bring an action against the lessors for breach of the lease. It stated that in light of its conclusion that the VFW failed to state a claim for breach of contract in the first instance, the court of appeals had no need to determine whether the VFW could bring a breach-of-contract action against the lessors notwithstanding the condemnation.[51] Accordingly, the court of appeals affirmed the

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relevant to the case presently on review. We cite to the court of appeals' unpublished opinion in order to examine the Redevelopment Authority's factual claims. We do not cite to the opinion as precedent.

[49] *Milwaukee City Post # 2874 Veterans of Foreign Wars of the U.S. v. Maharishi Vedic University, Inc.*, No. 2006AP1039, unpublished slip op., ¶¶15, 21 (Wis. Ct. App. Mar. 1, 2007).

[50] *Id.*, ¶¶16-18.

[51] *Id.*, ¶22.

circuit court's judgment and orders dismissing the VFW's action against the lessors.

¶63 The VFW's basic point is that if the VFW is denied the right to prove the fair market value of its leasehold interest when the VFW has been barred from proceeding against the lessors for breach of the lease, an unconstitutional taking has occurred. We disagree with the VFW. The VFW was not barred from suing the lessor for damages. The VFW, a long term lessee, is asking the condemnor to shield it from devaluation of its interest and to place it in a better position than a lessor-owner.

¶64 In effect the VFW is asking the Redevelopment Authority to protect the VFW against the loss of its sale price of the real estate, which was payable over many years through a favorable lease. The VFW agreed to the sale and leaseback arrangement, assumed the possibility of total loss, and did not protect itself against diminution of value of the property and condemnation. Equity does not require a condemnor to indemnify the VFW against the risk it undertook: that the value of its leasehold interest would not equal the sale price of its interest in the real estate. Mandatory indemnification through condemnation for a "lost purchase price" would be contrary to the principle that contracting parties are free and able to allocate economic risk.

¶65 We agree with the Supreme Court of Massachusetts, which has stated that it is not reasonable that "losses arising from the failure of

[private] contracts which otherwise might furnish grounds of damage between the individual parties, should measure the compensation to be rendered for the property so taken."[52] A condemnation proceeding cannot be used in these circumstances to recover damages that could have been determined by contract between the parties.

¶66 In sum, the VFW's failure to recover from the lessors for the lessors' failure to maintain the property is not related to the condemnation. The VFW's loss did not result from the application of the rule that complete condemnation of a property terminates a lease attached to that property and that the unit rule governs fair market value. The VFW's loss might have been recovered in an action against the lessors for damages for breach of the lease; this action foundered because the VFW, when proceeding in the circuit court, did not plead or argue that the lessors had breached any lease provision that required the lessors to maintain the premises.

¶67 Fifth, the VFW errs in relying upon *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189 (1910), stating in part that "the question is, What has the owner lost? not, What has the taker gained?"[53]

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[52] *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (1911).

[53] *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910).

Several Wisconsin cases repeat the language in *Boston Chamber of Commerce* stating that just compensation is based

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Reliance on *Boston Chamber of Commerce* is not persuasive under the circumstances of the present case.

¶68 In *Boston Chamber of Commerce,* the City of Boston laid out a public street on a parcel of land owned by the Boston Chamber of Commerce. The parcel was already subject to an easement of way, light, and air benefitting the Central Wharf and Wet Dock Corporation, as well as subject to a mortgage, itself subject to the easement, benefiting Boston Five Cents Savings Bank. An unencumbered interest in the parcel would have been worth approximately $60,000. The laying out of the public street, however, resulted in minimal damage to the owners. The fee

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on what the owner has lost, not what the condemnor has gained. None of these cases involves condemnation of property with multiple owners or the unit rule. *See Volbrecht v. State Highway Comm'n,* 31 Wis. 2d 640, 647, 143 N.W.2d 429 (1966) (holding that a jury instruction was in error insofar as it implied that "damages may be awarded for value created by the taking and its prospective use in the improvement. Just compensation is what the owner has lost, not what the condemnor has gained." (citing *Nichols on Eminent Domain*)); *Besnah v. Fond du Lac,* 35 Wis. 2d 755, 758, 151 N.W.2d 725 (1967) (relating to an owner's loss in a partial taking case (citing *Volbrecht*)); *Luber v. Milwaukee County,* 47 Wis. 2d 271, 279, 177 N.W.2d 380 (1970) (relating to an owner's loss of rental income resulting from an impending taking (quoting *Volbrecht* and citing *Besnah*)).

The court of appeals relied upon the language in *Boston Chamber of Commerce* in holding for the VFW in the present case. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the U.S. v. Redev. Auth. of Milwaukee,* 2008 WI App 24, ¶26, 307 Wis. 2d 518, 746 N.W.2d 536.

was worth little, being restricted by the easement, and the holder of the easement "lost nothing by the superposition of a public easement upon its own."[54]

¶69 The three property owners (Boston Chamber of Commerce, Central Wharf, and the Bank) wanted to value the parcel as if unencumbered so that Boston would have to pay $60,000 to the property owners to divide among themselves. The property owners contended that they were entitled to recover the full value of an undivided interest in the land that was taken, notwithstanding their actual loss, stipulated to be only $5,000.

¶70 Justice Oliver Wendell Holmes, writing for the United States Supreme Court, stated that "the question is, What has the owner lost? not, What has the taker gained?"[55] The loss that the owners sought to recover was "of theoretical creation, suffered by no one in fact."[56] Accordingly, the Court held that the owners were entitled to recover no more than the $5,000 required to compensate them for their actual loss, despite the larger value of an undivided interest in the land that had been taken. The Court stated: "We regard it as entirely plain that the [owners] were not entitled, as a matter of law, to have damages

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[54] *Boston Chamber of Commerce*, 217 U.S. at 194.

[55] *Id.* at 195.

[56] *Id.* at 194.

estimated as if the land was the sole property of one owner. . . ."[57]

¶71 A more recent United States Supreme Court decision, *Brown v. Legal Foundation of Washington,* 538 U.S. 216 (2003), is similar to the *Boston Chamber of Commerce* case. This case involved the constitutionality of IOLTA (Interest on Lawyers' Trust Account) funds, which the Wisconsin Supreme Court has also authorized. In *Brown,* the Washington Supreme Court had promulgated rules under which the interest on a certain class of lawyers' trust accounts was transferred to the Legal Foundation of Washington, which used the interest for tax-exempt, law-related charitable and educational purposes.[58]

¶72 The Washington Supreme Court's rules forbade lawyers from placing a client's funds in these trust accounts under circumstances in which the client's funds could generate net interest for the client's benefit.[59] Only funds that could not generate net interest for the client were to be placed in trust accounts yielding interest for the use of the Legal Foundation.[60]

¶73 The United States Supreme Court assumed for purposes of deciding *Brown* that the Washington

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[57] *Id.* at 195.

[58] *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 224-25 (2003).

[59] *Id.* at 224-25.

[60] *Id.*

Supreme Court's program amounted to a per se taking of the clients' interest in their escrow deposits.[61] The Court therefore turned its attention to determining whether any compensation was due to clients under the Just Compensation Clause of the Fifth Amendment.[62]

¶74 The Court concluded in *Brown* that a client was due zero compensation for the taking. The Court quoted and relied upon "Justice Holmes' characteristically terse statement"[63] in *Boston Chamber of Commerce* "that 'the question is what has the owner lost, not what has the taker gained.'"[64] The Court concluded that although the condemnor gained a lot of money from the plan of "condemning" the clients' interest, the clients lost nothing from the taking of interest; the Washington Supreme Court's rules did

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[61] *Id.* at 235.

[62] *Id.*

[63] *Id.* at 236.

[64] *Id.* (quoting *Boston Chamber of Commerce*, 217 U.S. at 195).

Another recent decision of the United States Supreme Court, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710 (1999), also has quoted Justice Holmes' statement in *Boston Chamber of Commerce*. *City of Monterey*, however, was not a just compensation case. The issue before the Court was "whether it was proper for the District Court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury." *City of Monterey*, 526 U.S. at 707.

Older United States Supreme Court cases quoting Holmes' aphorism but shed no light on its meaning and give no hint as to how it should be applied.

not permit their funds to be used for public purposes except when the clients' funds could not generate interest for the clients' benefit. The Court examined what the clients (the owners) lost, not what the condemnor gained, and concluded that "just compensation for a net loss of zero is zero."[65]

¶75 The *Boston Chamber of Commerce* and *Brown* decisions stand for the proposition that a condemnor need not provide compensation for a loss "of theoretical creation, suffered by no one in fact,"[66] regardless of the gain to the condemnor. *Nichols on Eminent Domain* interprets *Boston Chamber of Commerce* as demonstrating that the constitution permits deviation from the unit rule when the rule would result in a condemnee "recover[ing] more than the damages actually suffered by him."[67]

¶76 Neither the *Boston Chamber of Commerce* nor the *Brown* decision demonstrates that a condemnor is required to compensate several owners of a

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[65] *Brown v. Legal Found. of Wash.*, 538 U.S. at 240 n.11.

[66] *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 194 (1910).

[67] 4 Nichols, *supra* note 3, § 12.05[2].

See also United States v. 6.45 Acres of Land, 409 F.3d 139, 148 (3d Cir. 2005) (characterizing the *Boston Chamber of Commerce* decision as holding that "in a taking by the City of Boston, it was not unconstitutional for a commonwealth court to disregard the value of the unencumbered estate as a whole where there was a great disparity between the value of the unencumbered whole and the value of the estate in its actual state of title").

single parcel of land separately when doing so would mean paying more than the fair market value of the property as owned by a single owner.

¶77 When the language in *Boston Chamber of Commerce* stating that the question is what has the owner lost, not what has the taker gained, is read out of context, it could be interpreted as meaning that the condemnor must indemnify condemnees for all losses resulting from the condemnation, although doing so may mean paying more than the fair market value of the property that is taken. This interpretation, however, would be inconsistent with the Court's oft-repeated endorsement of the market approach to determining just compensation.[68]

¶78 Furthermore, the United States Supreme Court has made clear in numerous cases that

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[68] Johnston, *supra* note 5, at 311.

Professor Johnston, who argues for separate valuation of long-term leasehold interests, explains that the language in *Boston Chamber of Commerce* should not be interpreted to mean that the condemnor must fully compensate property owners on the basis of their loss:

> This passage [in *Boston Chamber of Commerce*] has occasioned considerable confusion. Out of context, the last sentence could be interpreted as an assertion that the Constitution incorporates the indemnity approach [to determining just compensation]. But this interpretation is completely inconsistent with the Court's oft-repeated endorsement of the market value approach.

Id. (footnote omitted).

indemnification of all losses suffered by the condemnee is not the rule. Although the Court generally "has sought to put the owner of condemned property 'in as good a position pecuniarily as if his property had not been taken,'"[69] the "principle of indemnity has not been given its full and literal force."[70] Notwithstanding the "loss to the owner" language in *Boston Chamber of Commerce,* compensation may be just although it does not provide full indemnification to a condemnee. Thus, for example, the United States Supreme Court has held that the condemnor generally may provide just compensation by paying the fair market value of condemned property, even though the market-value standard clearly leaves owners undercompensated to the extent that property is uniquely suited to their needs.[71]

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[69] *United States v. 564.54 Acres of Land,* 441 U.S. 506, 511 (1979) (quoting *Olson v. United States,* 292 U.S. 246, 255 (1934)).

[70] *564.54 Acres of Land,* 441 U.S. at 512.

[71] *See United States v. 50 Acres of Land,* 469 U.S. 24, 30 (1984) (stating that when property is taken from a private owner, "the possibility that the cost of a substitute facility exceeds the market value of the condemned parcel would not justify a departure from the market value measure."); *564.54 Acres of Land,* 441 U.S. at 514 ("[I]t is not at all unusual that property uniquely adapted to the owner's use has a market value on condemnation which falls far short of enabling the owner to preserve that use. . . . Yet the Court has previously determined that nontransferable values arising from the owner's unique need for the property are not compensable, and has found that this divergence from full indemnification does not violate the Fifth Amendment." (citation omitted)).

¶79 In sum, Holmes' "characteristically terse statement" in *Boston Chamber of Commerce* is clearly applicable to situations in which a condemnee seeks compensation for a theoretical loss. The statement has been subject to varying interpretation,[72] and is more frequently quoted in the United States Supreme Court's case law than explained or applied.

¶80 Sixth, the VFW errs in arguing that the conduct of the Redevelopment Authority justifies foregoing application of the unit rule in the present case. Counsel for the VFW asserted during oral argument that the Redevelopment Authority intentionally permitted the hotel building to deteriorate so that the Redevelopment Authority could acquire the building

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[72] Professor Victor Goldberg et al. contend that *Boston Chamber of Commerce* is best understood as reflecting the "offsetting benefits" doctrine, under which the condemnor may offset benefits generated by the condemnation in determining the final amount of "just compensation" payable to the condemnee. They argue that "[b]ecause the public right-of-way [created by the City of Boston] was nearly as valuable to the Wharf Company as the private easement, the net result was to deny it all compensation." Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. Rev. 1083, 1101 (1987). Thus, in the view of Professor Goldberg et al., the *Boston Chamber of Commerce* decision demonstrates that "the offsetting benefits rule can be a complicating factor in determining the correct measure of just compensation." *Id.* at 1102. Professor Goldberg et al. further conclude that "correctly analyzed, *Boston Chamber of Commerce* does not establish an exception to the undivided fee rule." *Id.*

and the underlying land at a reduced cost. The VFW urges that the unit rule should not be applied in light of the Redevelopment Authority's conduct.

¶81 Counsel's allegations are not supported by the record. The record does not make clear when or why the hotel building came to be in a worthless state at the time of condemnation.[73] That the building was worthless and needed to be razed made the underlying land worthless because the costs of razing the hotel exceeded the fair market value of the land. Furthermore, counsel's allegations regarding the Redevelopment Authority's conduct and motive are not consistent with the fact that the Redevelopment Authority initially paid a substantial sum in compensation for the taking of a property that was, according to the jury's verdict, worthless.

¶82 We conclude that using the unit rule in the present case to value the whole property to determine the amount of compensation due to the VFW does not violate the just compensation clause. We conclude that the VFW receives just compensation when it re-

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[73] The dissent asserts that "the City and the Redevelopment Authority together contributed to the decline of the underlying real property by their actions and inactions and by the lengthy delay between the condemning authority's announced intention to take the property and the filing of the condemnation petition." Dissent, ¶135.

The dissent's assertion is a finding of fact made improperly by the dissent rather than by the circuit court. Moreover, the dissent's finding of fact has no basis in the record in the present case.

ceives no compensation for its leasehold interest in a property that has no value. Accordingly, we reverse the decision of the court of appeals reversing the judgment of the circuit court. The judgment of the circuit court is affirmed.

The decision of the court of appeals is reversed.

¶83 ANNETTE KINGSLAND ZIEGLER, J. (*concurring*). While it is often said that bad facts make bad law, this court has not succumbed to that legal axiom in this case despite the absolutely dreadful situation the VFW finds itself in. I join the majority, but I write separately to emphasize that while we sympathize with the VFW, our sympathy cannot dictate the result.

¶84 The unfortunate situation the VFW finds itself in is quite sympathetic. The VFW, once the owner of the prime real estate at issue here, conveyed the property to another in exchange for a 99-year lease with annual rent due of $1. For that $1, the VFW obtained 5,250 square feet of space with no obligations to pay for taxes, utilities, maintenance, or even redecoration costs. Because of acts outside of the VFW's control, the building fell into a state of disrepair such that the city of Milwaukee condemned the property, which eventually led to the eviction of the VFW. The VFW claimed its interest in the property was $1.8 million, but pursuant to the unit rule, the VFW was unfortunately left with no money for its interest in the property. As a result, the VFW was left

not only with no place to conduct its business, but it was left with no money to find a new place to call home.

¶85 In a perfect world, the VFW would be given the necessary funds to replace their space. However, our precedent dictates that we must apply the unit rule to the case at hand, and as a result, the jury verdict must be sustained and the VFW will receive nothing for its loss.

¶86 While my heart may want to rule in favor of the VFW, that would require me to circumvent the unit rule, which our precedent requires that we apply in this case. To invent an exception here would swallow, and thus abandon, the rule. As Justice Wilcox once noted, "A legitimate system of law requires adherence to established legal principles, even if such adherence does not produce a result deemed desirable. . . ." *Thomas v. Mallett,* 2005 WI 129, ¶180, 285 Wis. 2d 236, 701 N.W.2d 523 (Wilcox, J., dissenting). The Missouri Supreme Court's Chief Justice has aptly noted:

> Judges are accountable to uphold the rule of law through their decisions. This means that, just as juries are asked to set aside their personal beliefs and decide a case based only on the law and the evidence, judges also must set aside their personal feelings, beliefs and attitudes and decide each case according to the facts and law in that case.

Column by Michael A. Wolff, C.J., Your Missouri Courts, Law Matters: Judges Are Accountable . . . To The Law (Dec. 15, 2005) available at http://www.courts.mo.gov/page.asp?id=1082.

¶87 Despite the unfortunate situation the VFW finds itself in, I must follow Wisconsin's precedent, and in this case that means I must join the majority's application of the unit rule.

¶88 I am authorized to state that Justice MICHAEL J. GABLEMAN joins this concurrence.

¶89 DAVID T. PROSSER, J. (*dissenting*). "Property must be secured or liberty cannot exist." John Adams 1791.[1]

¶90 The protection of private property is one of the principal objectives of the United States Constitution.[2] The original constitution prohibited the states

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[1] 6 *The Works of John Adams* 280 (Charles Francis Adams ed., 1850).

[2] "One great obj[ective] of Gov[ernment] is personal protection and the security of Property." 1 *The Records of the Federal Convention of 1787*, 302 (Max Farrand ed., Yale Univ. Press rev. ed. 1937 (quoting Alexander Hamilton)); *see also* Adam Smith, *Lectures on Jurisprudence* 1 (Ronald L. Meek et al. eds., Oxford University Press 1978) (1762-63)

> The first and chief design of every system of government is to maintain justice: to prevent the members of society from encroaching on one another's property, or seizing what is not their own. The design here is to

(Continued on following page)

from passing any "law impairing the obligation of contracts."[3] The Fifth Amendment added that "[n]o person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment imposed the due process limitation upon the states, and the United States Supreme Court later interpreted this due process provision as incorporating just compensation.[4] The prohibition against the impairment of contracts and the requirement of just compensation are embodied in the Wisconsin Constitution.[5]

¶91 This case concerns just compensation for a prepaid, long-term lease. The issue presented is whether the City of Milwaukee Redevelopment Authority (Redevelopment Authority) may take private property that is subject to a prepaid, long-term lease that has value, evict the leaseholder from the property, and demolish the property, impairing and terminating the leaseholder's contract and real property

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give each one the secure and peaceable possession of his own property.

[3] U.S. Const. art. I, § 10, cl. 1.

[4] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[5] Wis. Const. art. I, §§ 12 ("No . . . law impairing the obligation of contracts[ ] shall ever be passed. . . ."), 13 ("The property of no person shall be taken for public use without just compensation therefor.").

rights in the process, without paying the leaseholder any compensation whatever for the taking of its property. In short, may the Redevelopment Authority extinguish the leaseholder's rights without any compensation and still comply with all the constitutional requirements designed to protect private property rights?

¶92 The unusual circumstances of this case, culminating in zero payment for the taking of an 11-story building on historic Wisconsin Avenue in Milwaukee, as well as the termination of a valuable leasehold interest in that building, cry out for an exception to the "unit rule" because of the grossly unjust result that it visits upon the leaseholder. The majority will hear none of it. Indeed, the majority seizes the opportunity presented by this case to (1) disavow existing exceptions to the unit rule in Wisconsin law; (2) minimize Justice Oliver Wendell Holmes, Jr. and the Wisconsin cases citing his landmark decision in *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189 (1910); (3) repudiate the concept of consequential damages under the Wisconsin Constitution; and (4) validate the unprecedented proposition that no compensation is just compensation for the taking of valuable property. Thus, the majority decision represents a very different view of private property rights from what we are accustomed to in Wisconsin. For the reasons stated below, I respectfully dissent.

I

¶93 As noted, the facts in this dispute are unusual. The VFW was the sole owner of a parcel of real property situated on the south side of Wisconsin Avenue at 26th Street in downtown Milwaukee. In 1961, the VFW conveyed its land with improvements to Towne Metropolitan (Towne), a real estate development company that planned to construct a large hotel on the site. In return for the conveyance of its property, the VFW obtained a 99-year lease for 5,250 square feet on the ground floor of the new hotel. This lease contained an option to renew for another 99 years. It also provided that the VFW's space would be designed for VFW purposes and that all leasehold improvements and equipment would be furnished by the lessor. In addition, the annual rent was to be only $1.00, and the lessor would pay all real estate taxes, heating, air conditioning, and maintenance costs, and would redecorate the premises every seven years.

¶94 The terms of this lease were honored by Towne when the 11-story hotel was operated by Hilton Hotels, and later Holiday Inn, and then honored by Marquette University (Marquette), which acquired the property in 1986.

¶95 Over time, the neighborhood declined, and the 11-story building began to deteriorate. In 1994, Marquette sold the property, which was being used for student housing, to the Maharishi Vedic University (the Maharishi) for $600,000. The Maharishi never occupied the property.

¶96 One of the major fact questions in this case is why the Maharishi never occupied the building. Counsel for the Redevelopment Authority explained that the new owner was never given occupancy permits, presumably because the building had building code violations. Counsel for the VFW asserted that the City of Milwaukee refused to act on repeated demands by the VFW that the City enforce the building code against the new owner. Instead, the City simply continued to assess and tax the property at a value near the 1994 purchase price, while the Redevelopment Authority sent signals of its intention to condemn the property as part of an urban redevelopment project. In February 1998, the Redevelopment Authority held a public hearing to consider creating a redevelopment district, and after the hearing, it issued a relocation order. All these factors contributed to the deterioration of the building and its eventual abandonment by the Maharishi.

¶97 On January 18, 2001, after identifying three comparable properties and utilizing the unit rule, the Redevelopment Authority issued a jurisdictional offer in the amount of $440,000 to be divided between two named owners, the Maharishi and the VFW. On February 28, 2001, the $440,000 proposed Award of Damages was deposited with the Milwaukee County Clerk of Circuit Court. The award covered not only the land, the hotel building on the land, the personal property in the building, and the lease, but also an adjoining parking lot owned exclusively by the Maharishi.

¶98 On December 7, 2001, the Milwaukee County Circuit Court divided the Award of Damages. The Maharishi was awarded $140,000, less delinquent taxes, for the adjoining parking lot and its personal property in the hotel; the VFW was awarded $300,000, less taxes due, for the value of its leasehold interest.

¶99 The City had assessed the former hotel property at $566,000 for tax purposes in the year prior to the taking. It reduced the assessment to $1,000 for the year of the taking.

¶100 On February 15, 2002, the VFW appealed the adequacy of the Award of Damages to the Condemnation Commission (the Commission) pursuant to Wis. Stat. § 32.05(9). The Maharishi did not join this appeal, having accepted an award of $140,000, less delinquent taxes. After litigation to determine how the Commission should value the property, the Commission valued the total property, using a strict application of the unit rule, at $425,000; that is, $15,000 less than the Redevelopment Authority's jurisdictional offer. This award was made in December 2004.

¶101 The VFW appealed to Milwaukee County Circuit Court. After a four-day trial in September 2006, a jury determined that the hotel building had no value. The jury was not permitted to consider the value of the VFW's leasehold. The court thereupon entered judgment against the VFW in the amount of $387,348.24, taking back the $300,000 that was paid

to the VFW as part of the allocation of the Award of Damages, plus accumulated interest and costs.

¶102 The VFW appealed, and the court of appeals, in a unanimous decision, reversed. The court of appeals remanded the case to the circuit court for a determination of the value of the VFW's prepaid, long-term lease. It determined that the unit rule, as applied to the unusual facts of this case, was unconstitutional because it permitted a taking of the VFW's entire leasehold interest (as well as the building and underlying land) for zero compensation.

¶103 The Redevelopment Authority sought review in this court on grounds that the unit rule was and is the only appropriate method of valuing the combined interests in the property taken. The Redevelopment Authority asserts that it was acting prudently in condemning the property, evicting the VFW, and razing the building (as it did in 2003). It asserts that the building had become unsafe to its tenants and an impediment to area renewal and that it spent hundreds of thousands of dollars to raze the building and the adjoining parking ramp to prepare the area for future development.[6] The Redevelopment Authority claims that the court of appeals decision is unprecedented and will adversely impair the

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[6] The parcel of land at issue remains vacant and undeveloped after six years of ownership by the Redevelopment Authority. As a result, the parcel has yielded no tax revenue to local governments since it was condemned in 2001.

legitimate interests of public condemnation throughout Wisconsin.

II

¶104 The Fifth Amendment to the United States Constitution and Article I, Section 13 of the Wisconsin Constitution require that just compensation be paid when the government takes private property for a public purpose. This requirement bars the government "'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan v. City of Tigard,* 512 U.S. 374, 384 (1994) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

¶105 "It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation. . . ." *Alamo Land & Cattle Co. v. Arizona,* 424 U.S. 295, 303 (1976) (internal footnote omitted); *Maxey v. Redevelopment Auth. of Racine,* 94 Wis. 2d 375, 400, 288 N.W.2d 794 (1980) ("It is well settled that a lessee has a property interest; and, when that interest is completely taken by a condemning authority, the lessee is entitled to compensation."); *see also United States v. Petty Motor Co.,* 327 U.S. 372 (1946); *A.W. Duckett & Co. v. United States,* 266 U.S. 149 (1924).

¶106 The United States Supreme Court has said that just compensation "normally is to be measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'" *United States v. 50 Acres of Land,* 469 U.S. 24, 29 (1984) (quoting *Olson v. United States,* 292 U.S. 246, 255 (1934)). The Court has explained that just compensation could be measured in various ways depending on the circumstances. "In an effort . . . to find some practical standard, the courts early adopted, and have retained, the concept of market value." *United States v. Miller,* 317 U.S. 369, 374 (1943). "Deviation from this measure of just compensation has been required only 'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" *50 Acres of Land,* 469 U.S. at 29 (quoting *United States v. Commodities Trading Corp.,* 339 U.S. 121, 123 (1950)); *Kirby Forest Indus. v. United States,* 467 U.S. 1, 10 n.14 (1984).

¶107 The unit rule is a valuable tool in determining market value in a condemnation involving a single parcel of property that is encumbered by more than one interest, such as a lease. Specifically, "[t]he unit rule requires that [the] real estate be valued in respect to its gross value as a single entity as if there was only one owner." 4 *Nichols on Eminent Domain* § 13.01[16][a] (3d ed. 2007). "[The] rule exists for the protection of the condemnor," as it ensures that the aggregate value of the separate interests in the property cannot exceed the property's value as an

unencumbered whole. *Id.*, § 13.08[2]. "Ordinarily no difficulty (or apparent injustice) arises from the application of the [unit] rule. The value of a lease is paid to the lessee and deducted from the compensation of the owner of the fee." *Id.*, § 12.05[1].

¶108 Although the unit rule is the generally accepted method for valuing condemned property that is encumbered by various interests, its operation cannot displace the constitutional mandate of just compensation. *State v. Platte Valley Pub. Power & Irrigation Dist.*, 23 N.W.2d 300, 312 (Neb. 1946).[7] Accordingly, the unit rule cannot dictate the determination of just compensation in all cases involving multiple interests. *United States v. 6.45 Acres of Land*, 409 F.3d 139, 147 (3d Cir. 2005) ("[T]he unit rule is [not] to be applied rigidly in all cases."); *Nebraska v. United States*, 164 F.2d 866, 869 (8th Cir. 1947) ("[T]he [unit] rule is not one that is autocratically absolute."); *Nichols on Eminent Domain*, *supra*, § 13.08[4] ("Despite statements indicating broad acceptance of the unit rule, other methods have been approved by courts in valuing a leasehold

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[7] The rule requiring just compensation to each owner for that which is taken must be applied in all instances under our Constitution. [A]ny rule that may be laid down must itself be measured by the rule given in the Constitution, and any rule that so limits the damages in such case as that the result will be in fact less than just compensation for the injury suffered falls short of the constitutional measure.

State v. Platte Valley Pub. Power & Irrigation Dist., 23 N.W.2d 300, 312 (Neb. 1946) (internal quotations omitted).

interest."); *see also* majority op., ¶45 (discussing a host of jurisdictions that have departed from the unit rule).[8]

¶109 In some cases, "*a departure [from the unit rule] may be necessary to avoid grossly unjust results. See, e.g., United States v. Welch,* 217 U.S. 333, 338 (1910)." *6.45 Acres of Land,* 409 F.3d at 148 (emphasis added); *United States v. 499.472 Acres of Land,* 701 F.2d 545, 549 (5th Cir. 1983); *United States v. Corbin,* 423 F.2d 821, 828 (10th Cir. 1970); *Nebraska*, 164 F.2d at 869; *Arkansas State Highway Comm'n v. Fox,* 322 S.W.2d 81, 82-83 (Ark. 1959); *People ex rel. Dept. of Pub. Works v. Lynbar, Inc.,* 62 Cal. Rptr. 320, 327 (Ct. App. 1967); *State Highway Dept. v. Thomas,* 154 S.E.2d 812, 815-16 (Ga. Ct. App. 1967); *Wilson v. Fleming,* 31 N.W.2d 393, 401-02 (Iowa 1948); *Mayor of Baltimore v. Latrobe,* 61 A. 203, 205-06 (Md. 1905); *State ex rel. McCaskill v. Hall,* 28 S.W.2d 80, 82 (Mo. 1930); *Platte Valley,* 23 N.W.2d at 307-08; *see also* majority op., ¶¶ 41, 49 ("Departure from the unit rule may be made in rare and exceptional circumstances.").[9]

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[8] *See also* majority op., ¶38 ("The constitutional requirement of just compensation cannot be reduced to a formula or expressed in inexorable rules." (citing *United States v. Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 402 (1949); *United States v. Cors*, 337 U.S. 325, 332 (1949))).

[9] *See also* 4 *Nichols on Eminent Domain* § 12.05[2] (3d ed. 2007)

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¶110 There are rare exceptions to fair market value as the appropriate measure of just compensation, and there are rare exceptions to the unit rule as the appropriate way to determine fair market value. As the Supreme Court observed in *Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 408 (1878), "[e]xceptional circumstances will modify the most carefully guarded rule."

¶111 The court of appeals decision in this matter identified three Wisconsin cases where courts have recognized exceptions to the unit rule.

¶112 First is *Luber v. Milwaukee County,* 47 Wis. 2d 271, 177 N.W.2d 380 (1970). In *Luber,* this court interpreted Article I, Section 13 of the Wisconsin Constitution to award $11,200 in lost rent to the condemnees for 32 months of vacancy leading up to condemnation of their building. *Id.* at 273, 276, 284. The Milwaukee County Expressway Commission, which had condemned the building for a public purpose, was livid that it was being asked to pay for something more than the fair market value of the

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> The method of valuation based upon the undivided fee has been criticized where there was a great disparity between the value of the undivided fee and the aggregate value of the separate interests. Valuation of the separate interests, under such circumstances, has been held to be constitutional. It has, in fact, been intimated that *where the [unit] rule operates to the prejudice of the interest of the condemnee it might be considered unconstitutional.*

(Emphasis added.)

building. *See id.* at 276, 177 N.W.2d 380. "The question," this court stated, "is whether there are any *interests,* other than the building itself, for which appellants are constitutionally entitled to compensation." *Id.* at 278. The court answered with the following:

> We think that under property concepts one's interest in rental income is such as to deserve compensation under the "just compensation" provision of the Wisconsin Constitution. In the instant case it is undisputed that the pendency of the condemnation was the sole cause of the appellants' rental loss. The reason for formerly denying compensation for such interest was that the condemnor received no benefit from the taking thereof. This court, however, departed from such thinking when it said in *Volbrecht v. State Highway Comm*[*ission,* 31 Wis. 2d 640, 647, 143 N.W.2d 429 (1966),] that "Just compensation is what the owner has lost, not what the condemnor has gained. . . ."
>
> . . . .
>
> We believe that one's interest in rental loss is such as is required to be compensated under the "just compensation" clause of art. 1, sec. 13, Wisconsin Constitution.

Id. at 279, 283 (internal footnote omitted) (first ellipsis in original).

¶113 *Luber* represented a departure from the unit rule when it recognized lost rents as a compensable loss and described the "inadequacy of merely awarding the fair market value of the property actually taken." *Id.* at 280. *Luber* is the flip side of this case, because here, the "rent" was prepaid when the VFW conveyed its entire property to the developer for its leasehold interest. The *Luber* case is also valuable in illuminating how a tenant can be scared off by the "imminent" threat of acquisition of the leased property, just as here the Maharishi was motivated not to repair the hotel property, and ultimately to abandon the property because of the actions of the City and the Redevelopment Authority.

¶114 The second case is *Maxey*, 94 Wis. 2d 375. The facts in *Maxey* are complicated, but in essence, Maxey's 99-year lease in a building that was condemned by the Racine Redevelopment Authority rendered Maxey the owner of the building for purposes of a potential inverse condemnation award. *Id.* at 384. Maxey filed an inverse condemnation action three days before the Redevelopment Authority filed a direct condemnation action. *Id.* at 381.

¶115 The facts and reasoning of the *Maxey* case present striking parallels to the present case:

A. The unanimous court cited *Luber* with approval. *Id.* at 392.

B. The court reiterated that "long-term leasehold interests constitute ownership of land." *Id.* at 387-88.

C. The court closely tracked the conduct of the City of Racine and the Racine Redevelopment Authority leading up to formal condemnation. The City placed a moratorium on the issuance of theater licenses in the central business district of Racine, directly affecting a theater in Maxey's building which was denied renewal of its license. *Id.* at 385. The Redevelopment Authority and the City made published statements that the building "would be taken" through eminent domain. *Id.* The City and the Redevelopment Authority contacted tenants and told them that the property would be condemned and encouraged tenants to vacate the premises. *Id.* Some of these actions occurred more than three years before the actual petition for condemnation was filed. *Id.* The circuit court determined that a taking had effectively occurred two years before the Redevelopment Authority formally filed its petition for direct condemnation. *Id.* at 386. This court stated that "there was some impingement upon Maxey's uninhibited use of the property almost from the time the redevelopment project was proposed in 1973," *id.* at 388, which was well over three years before formal condemnation. The circuit court found that "the City of Racine and the Redevelopment Authority were responsible for each other's acts." *Id.* at 386. This court summed up the circuit court's finding

with the comment that "the City of Racine and the Redevelopment Authority were to be considered as alter egos in respect to the condemnation of the Baker Block Building." *Id.* at 390. The parallels to this case are self-evident.

D. The court cited *Just v. Marinette County,* 56 Wis. 2d 7, 201 N.W.2d 761 (1972), *Howell Plaza, Inc. v. State Highway Commission,* 66 Wis. 2d 720, 226 N.W.2d 185 (1975), and *Howell Plaza, Inc. v. State Highway Commission,* 92 Wis. 2d 74, 284 N.W.2d 887 (1979), to illustrate how government actions that effectively deprive a property owner of practically all beneficial use of his property, amount to a constructive taking or an inverse condemnation. *Maxey,* 94 Wis. 2d at 389-91. In this case, when the Redevelopment Authority acknowledges that the City would not give the Maharishi occupancy permits for the hotel building, it reveals similarities to the *Maxey* case.

E. The court said that "under ordinary circumstances, a lessee is entitled to some portion of the condemnation award." *Id.* at 401. It construed a "condemnation clause" in Maxey's lease to avoid a forfeiture: "The Wisconsin law, like the law generally, abhors a forfeiture." *Id.* at 403. "We conclude that the court erred when it interpreted the clause to completely

deprive the lessee of any interest." *Id.* at 400.[10]

F. The court remanded the case to the circuit court so that Maxey could proceed on an inverse condemnation claim. *Id.* at 406. The effect of this ruling was to avoid a narrow interpretation of condemnation damages under the unit rule because it recognized damages that were incurred before the formal taking.

¶116 The third case is *Redevelopment Authority of Green Bay v. Bee Frank, Inc.* (*Bee Frank II*), 120 Wis. 2d 402, 355 N.W.2d 240 (1984). In *Bee Frank II,* the circuit court, interpreting condemnation statutes, considered the separate appeal of a lessee who owned immovable fixtures in a condemned building. *Id.* at 404-05. The Green Bay Redevelopment Authority offered $282,000 to the owner of the building and offered $168,000 to Bee Frank for loss of its immovable fixtures. *Id.* at 405-06. Both parties rejected the offer. *Id.* at 406. The circuit court scheduled a hearing before the Condemnation Commission. Before that hearing, the owner of the building settled for $296,100. The Condemnation Commission then awarded Bee Frank $210,000, "an amount $41,592 (approximately 25 percent) in excess of the Redevelopment

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[10] There was no "condemnation clause" in the VFW's lease. Consequently, the leasehold interest of the VFW was not disqualified by contract from receiving all or part of any condemnation award.

Authority's jurisdictional offer." *Id.* When Bee Frank asked for litigation expenses, the Redevelopment Authority objected. *Id.*

¶117 The court recounted the procedural history:

> The trial court rejected the Redevelopment Authority's argument that the total amount of the property as a whole should be involved in determining Bee Frank, Inc.'s entitlement to litigation expenses. . . .
>
> The Redevelopment Authority appealed. . . . In a published opinion, the court of appeals held that immovable trade fixtures were an integral part of the building and could not be considered separately from the purchase price for the land and building in determining entitlement to litigation expenses.

Id. at 406-07 (citing *Redevelopment Auth. of Green Bay v. Bee Frank, Inc.* (*Bee Frank I*), 112 Wis. 2d 1, 331 N.W.2d 840 (Ct. App. 1983)).

¶118 In its decision, the court of appeals stated that a separate award could not be made for fixtures because of the unit rule. *Bee Frank I,* 112 Wis. 2d at 7. But this court disagreed:

> Respondent . . . argues that the unit rule of damages for real estate valuation mandates a finding that awarding separate litigation expenses to the owner of the immovable fixtures is impermissible. The unit rule requires improved real estate to be

> valued as a single entity for purposes of determining the total value of property taken through condemnation. . . . [However, w]hile the unit rule of damages is a controlling principle in eminent domain actions, *its application in determining entitlement to litigation expenses . . . contravenes the public policy.*

Bee Frank II, 120 Wis. 2d at 413-14 (emphasis added) (internal citations omitted).

¶119 The plain truth is, in *Bee Frank II,* the value of immovable fixtures was determined separately from the value of the whole property, and litigation expenses were not keyed to the value of the whole property. The unit rule was disregarded in fact while it was being affirmed in rhetoric.[11] The rule was set

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[11] To understand the significance of *Green Bay Redevelopment Authority v. Bee Frank, Inc. (Bee Frank II),* 120 Wis. 2d 402, 355 N.W.2d 240 (1984), one must consider the case in relation to the analysis employed by the court of appeals in *Green Bay Redevelopment Authority v. Bee Frank, Inc. (Bee Frank I),* 112 Wis. 2d 1, 331 N.W.2d 840 (Ct. App. 1983). There, the court of appeals stated the following:

> In eminent domain proceedings, Wisconsin has adopted the "unit rule of damages" approach for improved real estate, which requires that the real estate be valued as a single entity. "Buildings and improvements are not valued in isolation from the market value of the land, but are considered only to the extent that they enhance the value. The proper measure of damages is therefore the market value of the land with the improvements on it. . . ." *Milwaukee & Suburban Transport Corp. v. Milwaukee County,* 82

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Wis. 2d 420, 448-49, 263 N.W.2d 503, 518 (1978). A condemnation award should be based on the property's value as a whole as if there were only one owner, and it is only after the appropriated property's total value is determined that the award is *apportioned* among the various interests in the property.

. . . .

In *Milwaukee & Suburban Transport,* the court also approved an instruction similar to Wisconsin Civil Jury Instruction 8135 used in eminent domain proceedings involving buildings with improvements. Both instructions require the jury to value the property as a single unit comprised of the various components. . . . The first question asked for the fair market value of the property taken. The remaining questions merely asked what calculations had gone into the jury's determination of overall value.

. . . .

The State of New York, which has occasionally criticized the unit rule, nevertheless acknowledges that there is no dispute "that a separate award cannot be made for fixtures if what are claimed to be fixtures have become an integral part of the real property." *Marraro v. State,* 189 N.E.2d 606, 609 (N.Y. 1963). We agree. An appropriation of land is an appropriation of everything annexed to the land, whether classified as buildings or fixtures. Although the value of fixtures must be included in determining the appropriated property's total value, when a fixture has lost its identity by becoming a structural part of the building, *it can no longer become the subject of a separate award.*

Bee Frank I, 112 Wis. 2d at 5-7 (second emphasis added) (internal footnote omitted).

The court of appeals added in a footnote:

It appears questionable under a § 32.06 condemnation proceeding, however, whether a tenant who

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aside because its application would have contravened public policy.

¶120 The majority opinion in this case is quick to dismiss exceptions to the unit rule without coming to grips with the fact that exceptions were recognized in *Luber,* in *Maxey,* and in *Bee Frank II.* The majority is quick to borrow snippets from cases like *Maxey* and *Green Bay Broadcasting Co. v. Redevelopment Authority of Green Bay,* 116 Wis. 2d 1, 342 N.W.2d 27 (1983), which preceded *Bee Frank II,* to resist any relief to a property owner whose property was taken without any compensation whatever, as though addressing a grossly unjust result on highly unusual facts is somehow an illegitimate undertaking. Permitting a limited exception to the unit rule on the extreme facts before us would not undermine the rule any more than three previous exceptions have undermined the broad and general application of the rule.

III

¶121 In its decision, the court of appeals sought to provide a rationale for an exception to the unit rule in this case. It cited several different federal and

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owns immovable fixtures in a building is entitled to a separate hearing before the commission or circuit court. It also appears questionable whether a non-titleholder to the property, such as a tenant, is ever entitled to litigation expenses in a § 32.06 condemnation proceeding.

Id. at 8 n.3.

state cases, including *Boston Chamber of Commerce,* in which Justice Oliver Wendell Holmes, Jr., penned an oft-quoted aphorism pertaining to just compensation:

> [T]he Constitution does not require a disregard of the mode of ownership. . . . It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is *what has the owner lost, not what has the taker gained.*

Boston Chamber of Commerce, 217 U.S. at 195 (emphasis added). The court of appeals observed that, in this case, "the taker gained, according to the jury . . . , a building that was worthless when measured against fair market value. But what has the VFW lost? The jury was not allowed to consider the value of the leasehold because of the unit rule." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States v. Redevelopment Auth. of Milwaukee,* 2008 WI App 24, ¶26, 307 Wis. 2d 518, 746 N.W.2d 536.

¶122 The majority leaps to fend off any unfair question about what the VFW has lost: "[T]he VFW errs in relying upon *Boston Chamber of Commerce,* stating in part that 'the question is, What has the owner lost? not, What has the taker gained?'" Majority op., ¶67 (citation omitted). The majority tries to

dismiss the statement by Justice Holmes as "not persuasive" and taken out of context. *Id.* 67-79.

¶123 In fact, several Wisconsin Supreme Court cases have recognized the Holmes standard when determining just compensation in condemnation cases. *See, e.g., Luber,* 47 Wis. 2d at 279-80; *Besnah v. City of Fond du Lac,* 35 Wis. 2d 755, 758, 151 N.W.2d 725 (1967); *Volbrecht,* 31 Wis. 2d at 647. Despite the expressed acceptance of this standard in Wisconsin case law, the majority attempts to minimize the import of Justice Holmes's statement on the constitutional issue of just compensation. *See* majority op., ¶¶ 67-79.

¶124 The majority opinion dissects the *Boston Chamber of Commerce* case as though a penetrating new look at the facts will wipe out a century of legal decisions adhering to the Holmes standard. The Holmes standard is not irrelevant, as evidenced by the Supreme Court's decision in *Brown v. Legal Foundation of Washington,* 538 U.S. 216, 235-36 (2003), where Justice Stevens wrote as follows: "[T]he *'just compensation'* required by the Fifth Amendment is *measured by the property owner's loss rather than the government's gain.* This conclusion is supported by consistent and unambiguous holdings in our cases." (Emphasis added.) Similarly, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 710 (1999), Justice Kennedy observed that "[j]ust compensation . . . differs from equitable restitution and other monetary remedies available in equity, for in determining just compensation, 'the question is what

has the owner lost, not what has the taker gained.'" (Quoting *Boston Chamber of Commerce*, 217 U.S. at 195.)

¶125 The majority contends that determining just compensation by evaluating what the owner has lost and not what the taker has gained "would be inconsistent with the Court's oft-repeated endorsement of the market approach to determining just compensation." Majority op., ¶77. This overgeneralization is grounded in the fiction that the VFW lost nothing when its leasehold interest was taken, and it fails to appreciate that the individual valuation advocated by this dissent would measure the fair market value of what the owner (VFW) has lost. *See infra*, ¶132.

IV

¶126 The majority opinion makes the following statement: "[T]he 'fairness award' doctrine adopted by the court of appeals conflicts with the principle that damages lacking a direct relationship to the fair market value are incidental or consequential damages and are not considered when determining just compensation under the constitution." Majority op., ¶52. This statement serves little purpose except to reopen hostilities over issues considered at length in *City of Janesville v. CC Midwest, Inc.*, 2007 WI 93, 302 Wis. 2d 599, 734 N.W.2d 428, and to drive another nail into this court's notable decision in *Luber*.

V

¶127 The most disturbing element of this case is that the majority approves the unprecedented proposition that no compensation is just compensation for the taking of valuable property.

¶128 Like Justice Holmes, Justice Hugo Black had the facility for putting profound truths into simple words. In *Commodities Trading Corp.*, 339 U.S. at 123, he wrote the following in regards to just compensation: "[T]he dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

¶129 Zero compensation is not "just" to the leaseholder in this case. It exposes the absence of any balance between the interests of the leaseholder whose property is taken and the interests of the Redevelopment Authority that willfully moved to condemn the property. It takes the position that "compensation may be just although it does not provide full indemnification to a condemnee"[12] to its extreme, as though it were some inexorable rule that Stepford judges are powerless to resist regardless of the circumstances.

¶130 The majority cites *Green Bay Broadcasting* with approval. This is the case in which the court

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[12] Majority op., ¶78.

admits, "The unit rule is designed to protect the interests of the condemnor and not to protect the interests of a condemnee." *Green Bay Broadcasting,* 116 Wis. 2d at 11. This quote is unnerving to people who believe that our constitutions were designed to protect property owners, not property takers.

¶131 The unit rule usually works well, but it is *not* part of either the federal constitution or the state constitution, as the Redevelopment Authority insists, and it is unconstitutional when it deprives a property owner of just compensation. In this instance, we must fashion and apply something other than strict adherence to the unit rule to comply with constitutional provisions protecting property.

¶132 Rather than employing the unit rule at the expense of the U.S. and Wisconsin constitutions, this court should recognize an exception to the unit rule in this case so that the VFW's leasehold interest is valued independently of the property's fee simple interest. Specifically, the VFW's leasehold interest should be valued separately from the rest of the property by subtracting the value of the contract rent for the period remaining on the lease (what the VFW was obligated to pay during the lease period) from the value of the market rent for the period remaining on the lease. *See, e.g., Maxey,* 94 Wis. 2d at 400-01; *see also Nichols on Eminent Domain, supra,* § 13.08[6];

majority op., ¶¶ 22 n.10, 45.[13] This method "will adequately compensate [the VFW] for any pecuniary loss resulting from the taking."[14] *Nichols on Eminent Domain, supra,* § 13.08[6].

¶133 There may be other ways to arrive at just compensation. For instance, there ought to be some reasonable relationship between the assessed value of property for tax purposes and fair market value. The assessed value of the hotel property was $566,000 in 2000, *two years after* the Redevelopment Authority signaled its intent to condemn the property. The Redevelopment Authority offered $300,000 for the VFW's leasehold interest, a figure close to what its appraiser later testified the land alone would be worth. None of these three approaches will yield "just compensation" of zero.

¶134 The majority has given no attention to the most appropriate method of measuring the value of the VFW's leasehold interest because it is committed

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[13] "The generally accepted measure of compensation for such a taking is the fair market value of the leasehold for the unexpired lease term. . . . A lessee is, therefore, entitled to a sum which will adequately compensate it for any pecuniary loss resulting from the taking." 4 *Nichols on Eminent Domain, supra,* § 13.08[6] (internal footnotes omitted).

[14] The majority opinion implicitly accepts that, if the VFW's property were valued separately according to this method, there would be some fair market value to the VFW's leasehold that would need to be compensated. *See* majority op., ¶22 n.10 ("[W]e accept for purposes of our review the VFW's contention that its leasehold interest had value.").

to the proposition that, on these facts, zero compensation is just compensation.

¶135 To sum up: (1) the VFW had a prepaid, long-term lease of real value; (2) the lease was a recognized property interest, the taking of which requires just compensation; (3) there was no "condemnation clause" in the lease that forfeited the VFW's right to receive just compensation; (4) the City and the Redevelopment Authority together contributed to the decline of the underlying real property by their actions and inactions and by the lengthy delay between the condemning authority's announced intention to take the property and the filing of the condemnation petition; (5) the VFW was given no opportunity before the jury to prove the separate value of its leasehold interest, i.e., no opportunity to show what it lost; and (6) the VFW is being awarded no compensation whatever for the taking of its property.

¶136 Would that John Adams could rise from his grave to speak for the VFW, and for property rights in twenty-first century America. I believe he would observe that, if the VFW's property can be taken without compensation, no property is secure.

¶137 For the foregoing reasons, I respectfully dissent.

¶138 I am authorized to state the JUSTICE N. PATRICK CROOKS and JUSTICE PATIENCE DRAKE ROGGENSACK join this dissent.

2008 WL 183517

NOTICE: FINAL PUBLICATION DECISION PENDING. SEE W.S.A. 809.23.

Court of Appeals of Wisconsin.

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES, Plaintiff-Appellant,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, Defendant-Respondent.

No. 2006AP2866.

Jan. 23, 2008.

Appeal from a judgment of the circuit court for Milwaukee County: Elsa C. Lamelas, Judge. Reversed and cause remanded.

Before CURLEY, P.J., WEDEMEYER and KESSLER, JJ.

¶ 1 WEDEMEYER, J.

The City of Milwaukee Post 2874 Veterans of Foreign Wars of the United States (VFW) appeals from a judgment dismissing its claim that the Redevelopment Authority of the City of Milwaukee's (RACM) condemnation of the building within which the VFW had pre-paid for a long-term lease without compensation for the lease was unconstitutional. Because the "unit rule" as applied in this case is unconstitutional, we reverse the judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

¶ 2 The property involved in this case was the eleven-story hotel building located at 2601 West Wisconsin Avenue, which housed the VFW headquarters in 5250 square feet on the ground floor. In 1942, the VFW owned the building located on the property and used it as its post headquarters. In 1961, it conveyed the land and improvements to Towne Metropolitan, Inc., who constructed the eleven-story hotel. In exchange for the conveyance, the VFW obtained a ninety-nine-year lease, with the option to renew for another ninety-nine years. Under the leasehold, the VFW paid $1.00 annually and the lessor would pay all real estate taxes, all utilities, and cover maintenance on the property.

¶ 3 The property first operated as a Hilton Hotel and then as a Holiday Inn. In 1986, Towne sold the property to Marquette University, which used it as a dormitory. In 1994, the property was sold to the Maharishi Vedic University for $600,000. Both sales required the new owners to assume the responsibility to comply with the VFW's lease. The Maharishi never occupied the building after its acquisition.

¶ 4 In February 1998, RACM held a public hearing to consider creating a redevelopment district for the area including the parcel of land at 2601 West Wisconsin Avenue. Following the hearing, RACM issued a relocation order pursuant to WIS. STAT.

§ 32.05(1) (1999-2000).[1] After locating three comparable properties, RACM made a jurisdictional offer in the amount of $440,000 for the property, listing both Maharishi and the VFW as owners. The award included both the hotel and the adjoining parking lot located at 601 North 26th Street, which were owned solely by the Maharishi. In December 2001, the Honorable Michael P. Sullivan divided the $440,000 between the Maharishi and the VFW, allocating $140,000 to the former and $300,000 to the VFW for the value of its leasehold interest.

¶ 5 The VFW appealed the adequacy of the award to the Condemnation Commission. The Maharishi did not join the appeal. The Commission requested instruction from the trial court as to how to value the property. The trial court instructed the Commission to value the property using the "unit rule." The VFW petitioned for leave to appeal this determination, which we initially denied, but subsequently granted. We concluded that the unit rule should be used in the scheduled hearing before the Condemnation Commission, but we declined to address the constitutional issue of whether this application violated the Wisconsin Constitution. *See City of Milwaukee Redev. Auth. v. Veterans of Foreign Wars Post 2874,* 2003 WI App 225, 267 Wis.2d 960, 671 N.W.2d 717, unpublished slip op. (Sept. 30, 2003).

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[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶ 6 Subsequently, a hearing was conducted before the Condemnation Commission in December 2004 and it found the value of the property to be $425,000, which was $15,000 less than the initial award. The VFW appealed the damage award to the trial court under WIS. STAT. § 32.05(10) (2003-04). On July 13, 2005, the VFW moved the trial court for an order declaring the application of the unit rule in this case unconstitutional. The trial court denied the motion and that case was tried to a jury in September 2006. The issue considered by the jury was the value of the property. The jury returned a verdict that the hotel building at 2601 West Wisconsin Avenue had no value. Judgment was entered against the VFW in the amount of $387,348.24, which included the $300,000 it had already been paid, plus accumulated interest and costs. The VFW now appeals from that judgment.

DISCUSSION

¶ 7 The VFW argues in this appeal that: (1) the unit rule is unconstitutional as applied to the particular facts and circumstances of this case; (2) RACM should be estopped from claiming that the building has less value than the $566,000 tax assessment; and (3) this case should be reversed and remanded for a new trial based on cumulative evidentiary errors. Because we conclude that the unit rule as applied is unconstitutional, we reverse and remand so that the VFW has an opportunity to prove the value of its leasehold before the Condemnation Commission. Based on this disposition, it is not necessary for us to

address the other two issues raised. *See Gross v. Hoffman,* 227 Wis. 296, 300, 277 N.W. 663 (1938). The dispositive issue herein involves a constitutional issue, which we review independently. *See Schilling v. State Crime Victims Rights Bd.,* 2005 WI 17, ¶ 12, 278 Wis.2d 216, 692 N.W.2d 623.

¶ 8 WISCONSIN CONST. art. I, § 13 provides: "The property of no person shall be taken for public use without just compensation therefor." Yet, that is exactly the result of the judgment in this case. The jury found that the fair market value of the building at 2601 West Wisconsin Avenue was $0. The trial court ruled that based on the application of the unit rule, the VFW was not entitled to any compensation for the taking. Such a result violates the Wisconsin Constitution and cannot be affirmed. We begin our analysis with a brief review of the history of the unit rule.

¶ 9 The unit rule "requires that real estate be valued in respect to its gross value as a single entity as if there was only one owner." 4-13 NICHOLS, EMINENT DOMAIN § 13.01 § 13-28. There are two parts to the rule: "(1) there can be no separate valuation of improvements or natural attributes of the land; and (2) the manner in which the land is owned or the number of owners should not affect the value of the land." *Id.* The first part appears to have its genesis in

> the common law theory that anything that was attached to a freehold was annexed to and considered to be a part of it. If fixtures

> such as those in question here are attached to the real estate, they are treated as real estate in determining the total award. In computing the total award, they are considered to enhance the value of the fee. However, in condemnation proceedings, in apportioning the award, the fixtures are treated as personal property to be credited to the tenants.

Green Bay Broad. Co. v. Redevelopment Auth., 116 Wis.2d 1, 12, 342 N.W.2d 27 (1983), *modified by* 119 Wis.2d 251, 349 N.W.2d 478 (1984). The second part, sometimes referred to as the "undivided basis rule," applies when there are different interests or estates in the property acquired by condemnation. *Id.*

¶ 10 In simple terms, the unit rule has been used in condemnation cases to determine the fair market value of the property "as a single entity as if there were but one owner." *Id.* (citing *Milwaukee & Suburban Transp. Corp. v. Milwaukee County*, 82 Wis.2d 420, 448, 263 N.W.2d 503 (1978)). In *Appleton Water Works Co. v. Railroad Commission of Wisconsin*, 154 Wis. 121, 142 N.W. 476 (1913), the court applied the first of the two aspects of the "unit rule" (although not by name) to a taking of a public utility:

> [The] value of the plant and business is an indivisible gross amount. It is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all not as separate

> things, but as inseparable parts of one harmonious entity, and exercising the judgment as to the value of that entity.

Id. at 148. Thus, the rule was applied without calling it the unit rule. In *Luber v. Milwaukee County,* 47 Wis.2d 271, 177 N.W.2d 380 (1970), the court also does not discuss the "unit rule" *per se;* rather, the court was presented with the issue of whether WIS. STAT. § 32.19(4) (i.e., net rental losses caused by the proposed public land acquisition are compensable in eminent domain proceedings) was unconstitutional. *Luber,* 47 Wis.2d at 274. While the appellant argued that § 32.19(4) was an arbitrary and unreasonable limitation on just compensation, the respondent contended that compensation should be awarded only for the physical property taken and that "consequential" damages are to be suffered in legal silence. *Luber,* 47 Wis.2d at 276. The *Luber* court acknowledged that "'just compensation' has never been construed as requiring payment for all injuries imposed upon persons or property by acts of government." *Id.* at 277 (citation and one set of quotation marks omitted). However, the court concluded that "one's interest in rental income is such as to deserve compensation under the 'just compensation' provision of the Wisconsin Constitution." *Id.* at 279. "Just compensation is what the owner has lost, not what the condemnor has gained." *Id.* (citing *Volbrecht v. State Highway Comm'n,* 31 Wis.2d 640, 647, 143 N.W.2d 429 (1966)). Because land taken for redevelopment is often commercial or industrial, "incidental damages are very apt to occur

and in some cases exceed the fair market value of the actual physical property taken." *Id.* at 280. Denying recovery for other than the fair market value of the physical property actually taken is unjust. *Id.*

¶ 11 In *Milwaukee & Suburban Transport Corp.*, 82 Wis.2d 420, the court explicitly used the term "unit rule." It stated: "Under the 'unit rule of damages,' improved real estate is required to be valued as a single entity. Buildings and improvements are not valued in isolation from the market value of the land, but are considered only to the extent that they enhance the value of the land." *Id.* at 448 (quoting 4 NICHOLS, EMINENT DOMAIN (3d ed.), §§ 13.11, 13.11[2], pp. 13-8, 13-13 to 13-18). In this case, Milwaukee County condemned the operating assets of the Milwaukee & Suburban Transportation Corporation ("MSTC"). *Id.* at 426. At the taking, the MSTC was a franchised monopoly-type public utility. *Id.* at 433. The issue in *MSTC* pertinent to this discussion was whether the trial court erred in submitting a multiple-question verdict to the jury. *Id.* at 448. The county argued that the verdict be limited to a single question, which would ask the jury the fair market value of the property at the date of the taking. *Id.* The court held that "[t]he requirement that property be valued as an integrated and comprehensive entity does not mean that the individual components of value may not be examined or considered in arriving at an overall fair market value. . . . This approach does not contradict the 'unit rule'. . . ." *Id.* at

449. The structure of the verdict was consistent with the unitary approach because the first question asked the fair market value of the property taken and the remaining questions merely asked what calculations had gone into the jury's determination of overall value. *Id.* at 450. The court cited *Appleton Water Works Co.* as further support for the unit rule valuation method of a public utility.

¶ 12 In *Maxey v. Redevelopment Authority of Racine,* 94 Wis.2d 375, 384, 288 N.W.2d 794 (1980), Maxey was the owner of a ninety-nine-year lease, and at the time of the taking, forty years were left on Maxey's leasehold interest. The Condemnation Commission made a total compensation award of $350,000 to the persons having an interest in the property, including Maxey, two mortgagees of his leasehold interest, and the seven lessors who were owners of the fee. *Id.* at 382. However, "[t]he [c]ircuit [c]ourt found that, because of provisions in the lease between Maxey and the lessors, Maxey's interest in the lease terminated upon the taking of the property; and, accordingly, neither he nor his mortgagees were entitled to share in the proceeds." *Id.* at 383. The lease stated, in pertinent part:

> If all the rights, titles, interests and estates of both the lessors and lessees in said demised premises and buildings and improvements thereon shall be sold in the exercise of the right of Eminent Domain in condemnation proceedings . . . *[s]uch condemnation*

> *shall terminate the further liabilities of both the lessors and lessees under this lease. . . .*

Id. at 400 (emphasis added).

¶ 13 First, the *Maxey* court concluded that under ordinary circumstances, a lessee is entitled to some portion of the condemnation award. "Under Wisconsin law, a lessee with a lease for more than one year is a joint owner with the lessor of real property." *Id.* at 388 (citation omitted). A lessee has an interest in the property and is entitled to compensation when that interest is completely taken in a condemnation proceeding. *Id.* at 400. The unit rule requires that condemnation awards be based on the value of the property as a whole as if there were only one owner. *Id.* at 401. As a result, a lessee's interest is not considered separately from the other "owners'" interests; rather, the value of the lessee's leasehold is only relevant in determining the amount of the condemnation award apportioned to him. "A leasehold is normally valued as the difference between the rental value of the premises at the time of taking and the rent due the lessors during the unexpired term." *Id.* at 401. The compensation award should be thus "apportioned to the lessor for the taking of his reversionary interest and to the lessee for the taking of his leasehold." *Id.* However, "[w]here the leasehold is relatively long and rental values have substantially increased since the inception of the lease term, the lessee's share may exhaust the entire award." *Id.*

¶ 14 Second, the court held that a lessee may be barred from sharing in the proceeds of a condemnation award by a properly drawn lease provision. *Id.* Thus, the issue posed to the court in *Maxey* was whether the language of the lease is sufficiently explicit to cause a forfeiture of the lessee's normal right to share in the compensation award. *Id.* at 402. "Wisconsin law . . . abhors a forfeiture unless stated in most explicit terms." *Id.* at 403. If the terms of a lease are susceptible to two different constructions, the lease should be construed as not creating a forfeiture. *Id.* The court held that "the lease provision merely terminates the respective liabilities of the lessors and the lessee," *id.* at 402, and did not cause a forfeiture of Maxey's right to share in the compensation award.

¶ 15 In *Green Bay Broadcasting Co.*, the Redevelopment Authority appealed the condemnation commission award because it alleged that the Broadcasting Company's (a lessee) fixtures were overvalued. *Id.*, 116 Wis.2d at 8-9. The court held that in such a situation, an appellant is required to appeal from the whole award. *Id.* "The fact that there was an objection to the method of calculation or of the valuation of the components of the gross award . . . does not vitiate the condemnor's appeal from the gross award." *Id.* at 14. Rather, "[t]he appeal from the gross award was appropriate – indeed necessary under the unit rule – to attack the correctness of the constituent components that went into the gross award." *Id.* at 15. The court rejected the Authority's assertion that

the unit rule does not apply in Wisconsin, and affirmed its acceptance in Wisconsin jurisprudence. *Id.* at 11-12.

¶ 16 In *Redevelopment Authority of Green Bay v. Bee Frank, Inc.*, 120 Wis.2d 402, 355 N.W.2d 240 (1984), Bee Frank was a lessee who owned immovable fixtures in a condemned commercial building. The issue in *Bee Frank* was whether the court can separate the amount attributable to immovable trade fixtures from the purchase price of the land and building in a condemnation award, for the purpose of determining entitlement to litigation expenses. *Id.* at 407. The court held that an award for a tenant's immovable fixtures constitutes a separate award for the purposes of applying WIS. STAT. § 32.28(3)(d) (award of litigation expenses to condemnee). *Bee Frank,* 120 Wis.2d at 413. "While the unit rule of damages is a controlling principle in eminent domain actions, its application in determining entitlement to litigation expenses . . . contravenes . . . public policy. . . ." *Id.* at 414. The court relied heavily upon the public policy arguments in *Green Bay Broadcasting Co.*

¶ 17 In *Van Asten v. DOT,* 214 Wis.2d 135, 138, 571 N.W.2d 420 (Ct.App.1997), the plaintiffs owned and leased property to Rollins Leasing Corp. *Id.* at 138. The lease contained a condemnation clause, which provided in part:

> If the entire leased premises . . . [are] taken . . . [by] eminent domain . . . this lease shall terminate as of the date of such taking; and

> . . . the LESSOR will reimburse the LESSEE for twelve months rent. . . . [T]he LESSOR shall receive the entire award, including all amounts paid for the taking of the land, the taking or damage to the buildings or other improvements.

Id. at 138-39.

¶ 18 The threshold issue in *Van Asten* was whether the language of the condemnation clause was explicit enough to warrant a forfeiture of the lessee's normal right to share in the condemnation award. *Id.* at 141. The court held that the condemnation clause was controlling. *Id.* at 142-43. "We view the condemnation clause as nothing more than a negotiated reapportionment of risk between a lessor and a lessee. The condemnation clause was a carefully bargained paragraph. . . ." *Id.* at 144. The court cited *Green Bay Broadcasting Co.* and *Maxey* as authorities on the unit rule, and distinguished *Bee Frank* from this case, because *Bee Frank* did not involve an agreement, i.e., condemnation clause. *Van Asten,* 214 Wis.2d at 145.

¶ 19 Finally, in *Hoekstra v. Guardian Pipeline, LLC,* 2006 WI App 245, ¶ 5, 298 Wis.2d 165, 726 N.W.2d 648, the appellant alleged that the trial court erroneously excluded evidence of damage to trees that were either removed and/or transplanted as a result of installing a gas pipeline. The court held that the appellant's argument requires the valuation of a property's components separately from the fair market value, which is precisely what the unit rule prohibits.

Id., ¶ 43. And as the court reiterates, "the 'unit rule' approach to assessing severance damages is well-established under Wisconsin law and 'its acceptance is beyond question.'" *Id.*, ¶ 43 (citing *Green Bay Broad. Co.*, 116 Wis.2d at 11).

¶ 20 What we can discern from reviewing the history of the "unit rule" in Wisconsin are the following. First, our supreme court has determined that the unit rule applies in this state. Accordingly, we are bound by that determination. Second, lessees with leases for more than one year have a property interest in the real estate in which they lease for purposes of receiving compensation in an eminent domain action. Third, forfeitures are frowned upon absent an explicit contractual agreement between the parties that the lessee forfeits all rights upon condemnation. Fourth, in certain circumstances, the lessee of an unexpired lease terminated by condemnation has the right to prove the value of the lease and is entitled to the proportionate share of an award.

¶ 21 In applying these principles to the instant case, we note that the unique facts and circumstances here create a scenario that has not yet been addressed. The VFW conveyed real property in exchange for a very valuable leasehold – $1.00 per year for ninety-nine years to include all maintenance, taxes, utilities and remodeling costs for 5250 square feet of the building. The VFW, through its conveyance, obtained minimal rent and free occupancy costs provided in a long-term lease. Moreover, the VFW's

lease did not contain a forfeiture clause upon condemnation. Finally, the jury rendered a judgment wherein the fair market value of the building as a single unit was found to be worthless. Yet, it is undisputed that the leasehold interest is of great monetary value.

¶ 22 So, the crux of the appeal is the following. Strict application of the unit rule results in no compensation to the VFW. If the real estate was not worthless, the VFW, as a long-term leaseholder, would have the opportunity to prove the value of the leasehold for purposes of apportioning the condemnation award. Because of the application of the unit rule, however, the VFW was prohibited from proving the value of its lease to the jury in this case. We conclude that the application of the unit rule under these [e]xceptional circumstances is unconstitutional. *See Mississippi & Rum River Boom Co. v. Patterson,* 98 U.S. 403, 408 (1878) ("[e]xceptional circumstances will modify [even] the most carefully guarded rule. . . ."); *United States v. 6.45 Acres of Land,* 409 F.3d 139, 147-48 (3rd Cir.2005) (in some instances, a departure from the unit rule may be necessary to avoid grossly unjust results).

¶ 23 The "just compensation" provision of the Constitution is one of two express constitutional limitations on the power of eminent domain. "While it confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal*

Found., 538 U.S. 216, 231-32 (2003). "The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation." *McCoy v. Union Elevated R.R. Co.*, 247 U.S. 354, 365 (1918).

> [W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. . . . [T]he dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?

United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

¶ 24 Although Wisconsin jurisprudence has consistently applied the unit rule in determining fair market value for property in eminent domain actions, this is the first time that such application would result in the manifest injustice of the prepaid long-term leaseholder receiving nothing for its interest in the property. It would not receive *any* compensation, let alone *just* compensation. Such would result in an unconstitutional taking, which this court "abhors." *See Maxey*, 94 Wis.2d at 403.

¶ 25 The situation in this case involves a set of particular facts where designating fair market value

as the *sole* measure of compensation is inappropriate. *See United States v. 564.54 Acres of Land,* 441 U.S. 506, 512 (1979). Although fair market value is commonly used in eminent domain cases, it "is not an absolute standard nor an exclusive method of valuation. The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law." *United States v. Fuller,* 409 U.S. 488, 490 (1973) (citations and internal quotation marks omitted).

¶ 26 As Justice Oliver Wendell Holmes once stated in addressing this same issue: "[T]he question is, [w]hat has the owner lost? not, [w]hat has the taker gained?" *Boston Chamber of Commerce v. City of Boston,* 217 U.S. 189, 195 (1910). In the instant case, the taker gained, according to the jury in this case, a building that was worthless when measured against fair market value. But what has the VFW lost? The jury was not allowed to consider the value of the leasehold because of the unit rule. Such a result is inequitable, violates basic principles of fairness, and, as already indicated, is unconstitutional.

¶ 27 We agree with the principles espoused by the Maryland Supreme Court in *City of Baltimore v. Latrobe,* 61 A. 203, 206 (1905), that sometimes the necessities of the particular case require an apparent exception to the general unit rule. We conclude that the necessities of the particular case here require an exception to the general application of the unit rule. We hold that the unit rule as applied to the unique

circumstances in this case, render its strict application unconstitutional and would result in a taking of the VFW's property interest without any compensation.

¶ 28 The particular circumstances requiring this conclusion include the fact that the leasehold interest here was a long-term lease; that the lease did not include a forfeiture provision, and that the fair market value of the property was found to be $0. Under these circumstances, the VFW must be afforded an opportunity to prove the value of its separate leasehold interest. We reverse the judgment and remand the matter for a determination of the value of the VFW lease.

Judgment reversed and cause remanded.

671 N.W.2d 717

NOTICE: UNPUBLISHED OPINION. RULE 809.23(3), RULES OF CIVIL PROCEDURE, PROVIDE THAT UNPUBLISHED OPINIONS ARE OF NO PRECEDENTIAL VALUE AND MAY NOT BE CITED EXCEPT IN LIMITED INSTANCES. (The decision of the Court is referenced in the North Western Reporter in a table captioned "Wisconsin Court of Appeals Table of Unpublished Opinions".)

Court of Appeals of Wisconsin.
CITY OF MILWAUKEE REDEVELOPMENT AUTHORITY, Plaintiff-Respondent,
v.
VETERANS OF FOREIGN WARS POST 2874, Respondent-Appellant.
Nos. 02-1035, 02-1880.

Sept. 30, 2003.

Appeal from an order of the circuit court for Milwaukee County: Maxine A. White, Judge. Dismissed.

Appeal from an order of the circuit court for Milwaukee County: Michael P. Sullivan, Judge. Affirmed and cause remanded.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

SCHUDSON, J.

In these consolidated appeals, the Veterans of Foreign Wars Post 2874(VFW) challenges the circuit court order granting a writ of assistance to the Redevelopment Authority of the City of Milwaukee to evict VFW from the property at 2601 West Wisconsin

Avenue and from the non-final order[1] directing the Milwaukee County Condemnation Commission panel to apply the "unit rule" to determine "fair market value," under WIS. STAT. § 32.09(5)(a) (2001-02),[2] of the property where the VFW post was located.

¶ 2 We conclude that because a raze order for the building at 2601 West Wisconsin was approved, VFW's challenge to the order granting the writ of assistance is now moot and, accordingly, we dismiss the appeal in Case No. 02-1035. We also conclude that, because, under *Dotty Dumpling's Dowry, Ltd., v. Community Development Authority*, 2002 WI App 200, 257 Wis.2d 377, 651 N.W.2d 1, *rev. denied*, 2002 WI 121, 257 Wis.2d 118, 653 N.W.2d 890 (Wis. Oct. 21, 2002) (No. 01-1913), application of the "unit rule" was required and, therefore, we affirm Judge Michael P. Sullivan's order and return this case to the circuit court for further proceedings in Case No. 02-1880.

I. BACKGROUND

¶ 3 A brief history of the appellate litigation surrounding this case will help locate the central issue in these consolidated appeals.

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[1] On November 27, 2002, this court granted VFW leave to appeal Judge Michael P. Sullivan's July 9, 2002 order.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 32.09(5)(a) provides, "In the case of a total taking the condemnor shall pay the fair market value of the property taken and shall be liable for the items in s. 32.19 [relating to '[a]dditional items payable'] if shown to exist."

¶ 4 Appeal No. 01-1642: In 2001, VFW appealed from the circuit court order of Judge William J. Haese granting summary judgment to the Redevelopment Authority of the City of Milwaukee dismissing VFW's challenge, under WIS. STAT. § 32.05(5), to the acquisition, by condemnation, of VFW's ninety-nine-year leasehold interest to 5,200 square feet of space in property located at 2601 West Wisconsin Avenue in Milwaukee. We affirmed, concluding that VFW had waived its challenges. *See City of Milwaukee Post # 2874 v. Redevelopment Auth.*, No. 01-1642, unpublished slip op. (WI App Feb. 12, 2002). Much of the factual background of the instant appeals is recited in our per curiam decision, a copy of which is appended to and incorporated in this opinion.

¶ 5 Appeal No. 02-1035: In 2002, VFW appealed from the circuit court order of Judge Maxine A. White granting the Redevelopment Authority's application for a writ of assistance to evict VFW. As VFW, in its reply brief in Appeal No. 02-1880 concedes, however, "[b]ecause Judge [Jeffrey] Kremers on April 8, 2003 approved a raze order of the building . . . , the issue of whether a Writ of Assistance should be stayed is now moot." We agree.[3]

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[3] In No. 02-1035, VFW also challenges Judge Michael P. Sullivan's July 9, 2002 order with arguments that go beyond those mooted by the raze order. Those additional arguments, however, correspond to arguments VFW also presents in No. 02-1880. For clarity in these consolidated appeals, therefore, we dismiss No. 02-1035 but address VFW's arguments in that case

(Continued on following page)

¶ 6 Appeal No. 02-1880: In 2002, VFW, in an interlocutory appeal, challenged the circuit court order of Judge Michael P. Sullivan requiring application of the "unit rule" to determine the fair market value of the property where the post was located. This court consolidated these last two appeals and heard oral argument on August 5, 2003.

II. DISCUSSION

¶ 7 VFW argues that if we affirm the circuit court's order requiring application of the "unit rule," it "will be barred from presenting evidence regarding the value of its [l]ease" and it "will receive nothing as compensation for the termination of its [l]ease." It is undisputed that, at the point that condemnation effectively terminated VFW's lease, sixty years remained and the lease value, without any adjustment for inflation, exceeded eight million dollars. The City responds, however, that the value of VFW's lease is not a proper component in the determination of the property's "fair market value."

¶ 8 Our review of the circuit court's determination is *de novo*. *City of Racine v. Bassinger*, 163 Wis.2d 1029, 1034, 473 N.W.2d 526 (Ct.App.1991). Although the underlying litigation is factually and procedurally complicated, the appellate question is clear: *Under WIS. STAT. § 32.09(5)(a), must the City*

---

to the extent that they correspond to the arguments VFW presents in No. 02-1880.

pay the VFW anything more than the "fair market value of the property" as determined under the "unit rule"? We conclude that the case law, including this court's recent decision in *Dotty*, yields an equally clear answer: *No.*

¶ 9 In *Dotty*, Dotty was the owner of a restaurant in Madison when the Community Development Authority sought to acquire the property and raze the building to develop the area for a cultural arts facility. 257 Wis.2d 377, ¶ 2, 651 N.W.2d 1. As in VFW's case, the city, in *Dotty*, acquired title to the real estate and identified several potential replacement properties. *Id.*, ¶¶ 3-4. Dotty's cost of purchasing, relocating and remodeling, however, substantially exceeded the city's proposed condemnation award and relocation-assistance compensation. *Id.*, ¶ 4.

¶ 10 "Asserting that the Authority had not offered 'a comparable business replacement in compliance with sec. 32.05(8),' Dotty refused to vacate the property." *Id.*, ¶ 5. The city sought a writ of assistance, the circuit court issued it, and Dotty appealed, "on the grounds that the Authority did not make a comparable replacement property available to it as required by [WIS. STAT. § 32.05(8)]." *Id.*, ¶ 6. Arguing "that the only 'comparable replacement property' identified by the Authority which met Dotty's criteria was not 'made available' because the cost to purchase and remodel the property would be almost $1 million more than the amount Dotty could expect to receive from the Authority[,]" *id.*, ¶ 10

(footnote omitted), Dotty presented what, essentially, is the very theory VFW presents here.

¶ 11 In *Dotty*, this court acknowledged that WIS. STAT. § 32.05(8), in isolation, allowed for some uncertainty in determining "what a condemner must do in order to satisfy the requirement that a 'comparable replacement property' be 'made available.'" *Id.*, ¶ 11. We concluded, however, that consistent with this court's holding in *Bassinger*: (1) "WIS. STAT. § 32.05(8) grants a condemnee no rights beyond what the legislature has authorized in the relocation assistance law, WIS. STAT. § 32.19 *et seq.*," *Dotty*, 257 Wis.2d 377, ¶ 15, 651 N.W.2d 1; (2) "the Authority made available to Dotty the maximum allowable 'business replacement payment' authorized under WIS. STAT. § 32.19(4m)," *id.*, ¶ 20; and (3) therefore:

> by identifying potential replacement properties, obtaining renovation cost estimates for a property in which Dotty expressed some interest, tendering the maximum business replacement payment, and offering to reimburse Dotty for its other statutorily authorized relocation expenses, the Authority "made available" to Dotty a comparable replacement property "*to the extent required by the relocation assistance law.*" *Bassinger*, 163 Wis.2d at 1040, 473 N.W.2d 526.

Dotty, 257 Wis.2d 377, ¶ 21, 651 N.W.2d 1.

¶ 12 Acknowledging what might seem a harsh result, particularly in cases involving small

businesses (and, we might now add, non-profit organizations such as VFW), this court further explained:

> Finally, we note that Dotty's reading of WIS. STAT. § 32.05(8) suggests that a condemnor must provide virtually unlimited relocation assistance before it can gain possession of condemned premises. In Dotty's view, a court may not grant a condemnor possession of condemned premises until a replacement property deemed acceptable by the condemnee is procured, regardless of its acquisition costs, all of which the condemnor must bear or tender. Alternatively, Dotty's interpretation of the "made available" requirement implies that it will never have to vacate the condemned property if the Authority cannot identify a replacement property acceptable to Dotty which can be acquired for an amount not exceeding the award of compensation plus the maximum relocation benefits to which Dotty is entitled. Either result is unreasonable and contrary to the legislative intent regarding the "made available" requirement that we discerned in *Bassinger*.
>
> Given the limits specified by the legislature for the various relocation assistance benefit payments authorized by WIS. STAT. § 32.19, we agree with the trial court's conclusion that "[t]he law does not impose any . . . open-ended obligation upon a condemnor" to provide business relocation payments regardless of the cost to the condemnor. The obligation

> of the condemning agency under § 32.19 is to *assist* in the procurement and acquisition of replacement property, not to make a displaced business financially whole regardless of the cost to the condemning agency. In short, Dotty's interpretation would render meaningless the subsections of § 32.19 which place upper limits on relocation assistance payments, and it is thus an interpretation we cannot adopt.

Dotty, 257 Wis.2d 377, ¶¶ 26-27, 651 N.W.2d 1. Indeed, harsh though the result may be, this court recognized that "[t]he relocation statutes and regulations plainly contemplate that some business-owners will opt not to relocate or ultimately be unsuccessful in doing so." *Id.*, ¶ 29.

¶ 13 This court's conclusion in *Dotty* is consistent with the supreme court's pronouncements in *Green Bay Broadcasting Co. v. Redevelopment Authority*, 116 Wis.2d 1, 342 N.W.2d 27 (1983). The supreme court rejected the argument "that the unit rule does not apply in Wisconsin," and "point[ed] out that its acceptance is beyond question in Wisconsin jurisprudence." *Id.* at 11, 342 N.W.2d 27. The supreme court emphasized:

> *The unit rule is designed to protect the interests of the condemnor and not to protect the interests of a condemnee.* The condemnees, irrespective of their interests, are indeed constitutionally entitled to just compensation, but contracts between the owners of *different interests in the land should not be*

> *permitted to result in a total sum which is in excess of the whole value of the undivided fee.*

Id. (emphasis added). Here, it is undisputed that the multi-million dollar award that would be required to compensate VFW for the value of its lease would be substantially "in excess of the whole value of the undivided fee." *See id.* And here, VFW does not dispute that, if *Bassinger* and *Dotty* apply, its appeal cannot prevail.

¶ 14 Ultimately, VFW asks this court to either: (1) distinguish *Dotty* and find it inapplicable here; or (2) essentially ignore the case law and "make an exception to the unit rule"; in order to (3) "compel [the City] . . . to provide . . . sufficient funds to build a replacement property and establish a fund adequate to offset its occupancy costs." Notwithstanding our considerable sympathy for the VFW, we see no basis on which to distinguish this case from *Dotty* and, therefore, we have no authority to grant VFW its requested relief. *See Cook v. Cook*, 208 Wis.2d 166, 190, 560 N.W.2d 246 (1997) (court of appeals bound by its decisions). The case law, culminating in *Dotty*, controls.

¶ 15 In *Dotty*, however, this court did not decide whether WIS. STAT. § 32.05(8), as applied, "constituted an unconstitutional taking because it deprived Dotty, without just compensation, of its ability to continue operating its business." *Dotty*, 257 Wis.2d 377, ¶ 30, 651 N.W.2d 1. Although VFW would

have this court decide that constitutional issue, the circuit court has not yet addressed it.[4]

By the Court. – Appeal dismissed in No. 02-1035; order affirmed and cause remanded in No. 02-1880.[5]

Thus, this court believes that, with genuine and concerted efforts involving both the public and private sector, the City and VFW can locate an excellent new home where VFW will thrive while adding stability and vitality to its new neighborhood. Hopefully, the parties now can join forces to find a solution.

---

[4] The VFW also challenges what it perceives as the circuit court's refusal to order the City to provide a copy of the appraisal report. The VFW concedes, however, that "[t]he Nicholson appraisal report . . . has been furnished to the VFW" and that it is "not clear" whether any other report exists. At oral argument, the VFW did not dispute the City's assertion that no other report exists but, instead, contended that the City should be required to create an appraisal that is consistent with its proposed compensation. The VFW offered no authority supporting this novel notion and we see no basis on which to require the City to do so.

[5] Although this case will return to the circuit court for further proceedings consistent with this decision, we would be remiss if we failed to express our view that, hopefully, the parties now will till their common ground. After all, the City agrees that the VFW post in this case has experienced most unfortunate circumstances. The City also agrees that a VFW post can be a very positive influence in a neighborhood; therefore, clearly, *the City has a stake in VFW's continuing existence.*

Not recommended for publication in the official reports.

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES,

Plaintiff,

v.

THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,

Defendant.

Case No. 05-CV-000365
Case Classification Code: 50402

JUDGMENT

(Filed Nov. 6, 2006)

This case having been tried to a jury on September 11-14, 2006, the jury returned a verdict and the court being apprised of the Award of Damages made to the Plaintiff,

JUDGMENT IS HEREBY ENTERED against Plaintiff City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States, with its principal place of business located at 1555 South Union Street, Milwaukee, Wisconsin 53204, and in favor of Defendant The Redevelopment Authority of the City of Milwaukee, 809 North Broadway, Milwaukee, Wisconsin 53202, awarding Defendant the sum of

$300,000.00 in damages, plus interest and costs in the amount of $87,348.24 for a total of $387,348.24.

Dated this NOV-6 2006 day of ~~October~~, 2006.

/s/ Carolyn Carter
Judgment Clerk

[SEAL] **OFFICE OF THE CLERK**

Supreme Court of Wisconsin

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You are hereby notified that the Court has entered the following order:

2006AP2866 City of Milwaukee Post No. 2874 v. Redevelopment Authority of the City of Milwaukee

The court having considered the Motion for Reconsideration filed in the above matter,

IT IS ORDERED that the Motion for Reconsideration is denied, with $50.00 costs.

Justice Roggensack dissents.

David R. Schanker
Clerk of Supreme Court

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

CITY OF MILWAUKEE
POST NO. 2874 VETERANS
OF FOREIGN WARS,

Plaintiff,

v.

Case No. 02-CV-001711
Code No. 30402

REDEVELOPMENT
AUTHORITY OF THE
CITY OF MILWAUKEE,

Defendant.

MOTION TO RESOLVE CONSTITUTIONAL ISSUE DUTY TO DISCLOSE APPRAISAL (WIS. STAT. 32.05(2)(a))

TO: Harry A. Stein
Assistant City Attorney
800 City Hall
200 East Wells Street
Milwaukee, WI 53202-3551

PLEASE TAKE NOTICE that the plaintiff, VFW Post 2874, will move that branch of the Circuit Court of Milwaukee County presided over by the Honorable Patricia D. McMahon on Monday, July 12, 2004 at 10:00 a.m. for a determination that the application of the unit rule violates the just compensation provisions of §13 Article 1, Wis. Const. and the Fifth and Fourteenth Amendment of the U.S. Constitution.

The VFW will move further for an order directing the Redevelopment Authority of the City of Milwaukee to disclose the value analysis or appraisal report upon which the jurisdictional offer was based pursuant to the provisions of Wis. Stats. §13.05(2)(a) and Wis. Stats. §32.05(3)(e).

Dated at Milwaukee, Wisconsin this 10th day of May, 2004.

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SUPREME COURT, U.S.
FILED
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No. 09-1204

IN THE

Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874
VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE
CITY OF MILWAUKEE,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION RESTATED

Whether the Wisconsin Supreme Court, applying the "unit rule" of valuation, which has never been held to violate the federal Constitution, properly refused to recognize as a matter of state constitutional law an exception to the rule in the atypical circumstances of this case?

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IN THE

Supreme Court of the United States

No. 09-1204

CITY OF MILWAUKEE POST NO. 2874
VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE
CITY OF MILWAUKEE,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

This case involves the condemnation in the City of Milwaukee of a residential hotel that had been substantially unoccupied for seven years and was riddled with building code violations. Following established Wisconsin law, a state trial court entered judgment on a jury verdict determining the fair market value of the property to be $0. The Wisconsin Supreme Court upheld this decision, rejecting the argument that this determination "contravene[s] [the] *state* constitutional right to just compensation" of petitioner, a lessee who held a leasehold interest in the property. Pet. App. 3 (emphasis added). In so ruling, the court reaffirmed and applied the "unit

rule," a well-established valuation principle in Wisconsin constitutional and statutory law whereby property is valued in eminent domain as an undivided fee simple and this value is then apportioned among multiple owners in accordance with their respective interests. *See, e.g.*, Wis. Stat. §§ 32.05(7)(a), 32.05(9)(a)(1), 32.09(5)(a).

Petitioner has responded to the state supreme court's decision by presenting to this Court a *federal* question that was neither pressed nor passed on in the case below. In these circumstances, even apart from the absence of the traditional criteria for granting certiorari—in particular, the lack here of a federal constitutional conflict in the courts below—review is inappropriate: the Court lacks jurisdiction under 28 U.S.C. § 1257.

COUNTERSTATEMENT OF THE CASE

The fact-driven nature of this controversy and petitioner's incomplete and inaccurate statement of the case require this counterstatement of the case. In order to place the petition in context, it is necessary to set forth a brief description of (1) the property and the lease, (2) the condemnation proceedings, and (3) the appellate decisions.

1. Property and Lease. Petitioner, a branch of the Veterans of Foreign Wars ("VFW"), was a long-time tenant in a building located on the near west side of Milwaukee: viz., at 2601 West Wisconsin Avenue (the "Building"). Pet. App. 9. This tenancy derived from a business deal transacted decades ago: In 1961, petitioner sold its building on the site (the Best Mansion) and the underlying property to Towne Metropolitan, Inc. *Id.* In exchange, petitioner received a 99-year lease on 5,250 square feet on the

ground floor of the 11-story hotel that was to be constructed on the site. *Id.* Petitioner negotiated rent of $1 year, with the lessor to pay all taxes, heating, air conditioning, and maintenance. Pet. App. 9-10. Petitioner also negotiated for the option of renewing its lease for a further 99 years. Pet. App. 10.

Although this lease obviously contained terms very favorable to petitioner, it did not include other provisions that one would expect to find in a long-term commercial lease containing these terms. For example, petitioner agreed that its lease was subordinate to the building owner's mortgage, with the result that the lease could be eliminated upon default and foreclosure on the mortgage. Resp. App. 6a.[1] Likewise, petitioner failed to insist that the owner maintain insurance on the Building, thereby creating the risk that the lease would be rendered valueless if the Building were destroyed by fire or other casualty. *Id.* And, of greatest consequence as the future would unfold, petitioner did not negotiate a condemnation clause that would protect the value of its interest in the event that the Building were taken by eminent domain and the lease automatically terminated. *See* Pet. App. 10; Resp. App. 6a.

The new owner proceeded to build the hotel on the site, with petitioner (pursuant to the lease) enjoying a small portion of square footage on the ground floor. Pet. App. 9. Over the years, ownership of the Building changed hands several times. Pet. App. 10. Each

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[1] Although petitioner does not include the lease in its submission in this Court, it can be found in the record and is reproduced in the Appendix to this Brief in Opposition (Resp. App. 1a-9a).

successive owner honored the lease, providing petitioner effectively cost-free space for over 40 years. *Id.* By 1994, the Maharishi Vedic University was the owner of the Building, but it was never able to take occupancy. *Id.* The condition of the Building had deteriorated to the point where significant code violations existed. Pet. App. 10-12. The City of Milwaukee therefore could not issue occupancy permits for the Building. Pet. App. 11-12.

2. Condemnation Proceedings. In light of the deteriorated condition of the Building and the neighborhood, respondent Redevelopment Authority of the City of Milwaukee ("Redevelopment Authority"), acting pursuant to the state's Blighted Area Law, Wis. Stat. §§ 66.1331 and 66.1333, publicly suggested in 1998 that a redevelopment district be created, encompassing the Building. Pet. App. 10-11. The next year, respondent created the redevelopment district, issued a relocation order setting forth a relocation plan, and identified three comparable properties for petitioner. Pet. App. 10-11, 56.

Consistently with Wis. Stat. § 32.05, the Redevelopment Authority made a jurisdictional offer of $440,000 to purchase the property—$300,000 for the Building in which petitioner was the tenant, and $140,000 for the personal property of the owner (Maharishi Vedic University) and the adjacent parking lot of Maharishi Vedic in which petitioner had no leasehold or other interest. Pet. App. 11. A separate apportionment proceeding under Wis. Stat. § 32.05(7)(d) was held to determine the apportionment of the $300,000 payment for the Building. Based on the favorable terms of the lease, the Milwaukee County Circuit Court (No. 01-CV-1802) apportioned the entire $300,000 payment (less taxes)

for the Building to petitioner as lessee. Pet. App. 12. The Maharishi Vedic received only the $140,000 (less taxes) for its personal property and the adjacent parking lot. *Id.*

Petitioner obtained and deposited in its bank account its apportioned share of the Redevelopment Authority's $300,000 payment for the Building. Pet. App. 12.[2] Petitioner then elected to challenge the $300,000 award by appealing the issue of the Building's value to the Milwaukee County Condemnation Commission. *Id.* Petitioner requested that the unit rule not be applied before the Condemnation Commission, and the Commission asked the Milwaukee County Circuit Court (No. 02-CV-1711) for a ruling. The circuit court ordered the Condemnation Commission to value the property under Wis. Stat. §32.09(5)(a), consistently with Wisconsin's unit rule. Pet. App. 12.

Petitioner persuaded the Wisconsin Court of Appeals to grant interlocutory review of the circuit court's order requiring application of the unit rule. Pet. App. 98. The court of appeals affirmed the holding that Wisconsin precedent required that the unit rule be applied to value the Building. Pet. App. 102. Petitioner did not seek further review of this decision by the Wisconsin Supreme Court.

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[2] In February 2001, petitioner filed a separate suit challenging the right of the Redevelopment Authority to condemn the land. The circuit court granted summary judgment to the Redevelopment Authority and was affirmed by the Wisconsin Court of Appeals. *See City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority of Milwaukee*, 2002 WI App. 85, 252 Wis. 2d 768, 642 N.W.2d 646 (unpublished opinion).

Petitioner meanwhile remained in the Building, which the City of Milwaukee deemed unfit for human occupancy.[3] Pet. App. 12 n.8. Because of its dangerous condition, the City of Milwaukee ordered the building razed, which order petitioner challenged by separate action in the circuit court, in March 2003. *Id.* Agreeing that the Building was not fit for human occupancy, the court issued the order. Pet. App. 100. The building was razed. *Id.* At present, the land has been cleared of all structures and is vacant. Pet. App. 12 n.8.

Following the court of appeals' disposition of the interlocutory review challenging the use of the unit rule, the case returned to the Milwaukee County Condemnation Commission under the supervision of the Milwaukee County Circuit Court. In these early prehearing proceedings, petitioner filed a notice of motion to reconsider use of the unit rule, citing, in the four-sentence body of the document, state and federal constitutional grounds. Pet. App. 113-114. In its briefs and argument, however, petitioner sought only a determination that application of the unit rule violated the Wisconsin Constitution. The circuit court denied the motion. The case proceeded to determination before the Condemnation Commission.

After hearings and testimony (including testimony by petitioner about the value of its lease), the Con-

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[3] In 2003, petitioner filed a motion for statutory relocation benefits under Wis. Stat. § 32.20. Petitioner argued that it was entitled to "comparable replacement property," which it estimated, upon factoring in the cost of acquiring a site and constructing a new building, to be $1.2 million. *See City of Milwaukee Post 2874 VFW v. Redevelopment Authority of Milwaukee*, 2006 WI App. 56, 290 Wis. 2d 510, 712 N.W.2d 86 (unpublished opinion). The Wisconsin Circuit Court (No. 03-CV-9524) denied the request, which also was denied on appeal. *Id.*

demnation Commission decided that respondent should pay an award of $285,000 for the Building (which was $15,000 less than the $300,000 that the Redevelopment Authority had awarded for the Building). Pet. App. 12-13. Petitioner filed a case in the circuit court to appeal this award, and thus began the lower court case which gave rise to the Wisconsin Supreme Court decision at issue here.

In this newly filed and numbered case (No. 05-CV-365), petitioner again challenged the constitutionality of the unit rule as a matter of state law. Petitioner briefed only whether application of the unit rule would violate the Wisconsin Constitution (viz., Art. I, § 13). Pet. App. 13-14. The circuit court concluded that the unit rule was constitutional and should be applied to this case. Pet. App. 14.

Petitioner and respondent tried before a jury the issue of the fair market value of the Building. *Id.* They submitted competing evidence. Pet. App. 15. Petitioner's appraisal expert testified that the property could be renovated and used for "general residential" purposes. Pet. App. 16. Although petitioner's expert could not testify that the suggested use was "financially feasible," he nonetheless assigned value to the Building. *Id.* By contrast, respondent's appraiser testified that "the cost of remodeling the building to make it usable [including substantial asbestos removal] would be more than the fair market value of the building and land." Pet. App. 7-8. He further concluded that "the value of the land in an undeveloped state is exceeded by the cost of demolishing the building to render the land vacant." Pet. App. 8.

The jury determined that "the undivided interest in the property condemned in the present case by the

Redevelopment Authority had no value at the time of the taking." Pet. App. 5.[4] Accordingly, the circuit court determined that "the VFW is not entitled to receive any compensation from the Redevelopment Authority and must reimburse the Redevelopment Authority for money paid to it." Pet. App. 6.

3. State Appellate Proceedings. Petitioner appealed the circuit court's decision to the Wisconsin Court of Appeals. Petitioner's statement of issues in its brief to the Wisconsin Court of Appeals challenged the constitutionality of the award under the Wisconsin Constitution:

> Is application of the "unit rule" prohibiting the VFW from proving and recovering the value of its lease, which was terminated by condemnation, a violation of Sec. 13, Article I of the Wisconsin Constitution?

Brief and Appendix of Plaintiff-Appellant, at 1, Wis. Ct. App. (Mar. 2, 2007). Consistently with the stated issue, petitioner's brief argued against application of the unit rule on the ground that it violates the just-compensation provision of Article I, Section 13 of the Wisconsin Constitution. Respondent correspondingly countered with arguments under the state constitution.

The Wisconsin Court of Appeals ruled for petitioner in what the Wisconsin Supreme Court would call a decision based on "public policy." Pet. App. 24. The

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[4] The special verdict question read as follows: "What was the fair market value of the entire property located at 2601 West Wisconsin Avenue, in the City and County of Milwaukee, as a whole unit and single entity, with all its square footage, on February 28, 2001, in the condition of the property on that date?" Pet. App. 17. The jury's response was "$0." *Id.*

Wisconsin Court of Appeals concluded that, in the "particular circumstances" of this case, an exception to the unit rule was required. Pet. App. 87. In reaching its decision, the Wisconsin Court of Appeals analyzed in detail Wisconsin's unit-rule decisions and made passing reference to federal cases. Pet. App. 85-96.

The Wisconsin Supreme Court granted respondent's petition for review. It explained the "issue on review" as the constitutionality of compensation as determined under state law:

> If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just compensation under Article I, Section 13 of the Wisconsin Constitution, been violated?

Pet. App. 6-7. This was the focus of the parties: debating lawfulness of the award under the Wisconsin Constitution. Petitioner did not pursue a takings claim under the United States Constitution.

The Wisconsin Supreme Court reversed the court of appeals and reinstated the judgment of the circuit court. The Wisconsin Supreme Court held that "the unit rule of the circuit court applied in the present case does not contravene the VFW's *state* constitutional right to just compensation." Pet. App. 3 (emphasis added). As thus expressly discussed in the majority opinion, and as the petition itself points out, the Wisconsin Supreme Court's decision was the product of adherence to "Wisconsin's precedent." Pet. 1.

In addition to defending the unit rule, respondent argued in the proceedings below that petitioner's challenge was barred by the law of the case, claim

and issue preclusion, waiver, and due process, because the Wisconsin Court of Appeals, in the earlier interlocutory review proceeding which petitioner did not appeal to the Wisconsin Supreme Court, had upheld application of the unit rule. Pet. App. 3-4 n. 2. Because it ruled for respondent on state constitutional grounds, the Wisconsin Supreme Court did not reach these issues. *Id.*

REASONS FOR DENYING THE PETITION

Petitioner would have this Court upset the Wisconsin Supreme Court's application of an established state-law rule, in order that respondent might award petitioner something for its lease. But this Court is not charged with intervening in state law to right alleged wrongs. This is so here as a matter of law under 28 U.S.C. § 1257. It may well be so as a matter of prudence also: the alleged wrong hinges on factual determinations involving the application of settled principles of state just-compensation law to the highly atypical circumstances of this case. This Court does not sit to second-guess state courts as to when it is appropriate to recognize an exception to general principles grounded in state law. This is especially true in a controversy that has already generated five opinions by state appeals courts.

In any event, the "unit rule" or the "undivided fee rule" does not produce a result contrary to federal law or, as applied by the states with inevitable variations under state law, generate a conflict in federal constitutional law, warranting this Court's review. The Court should decline petitioner's invitation to transform a reasonably well-settled body of state law into federal law and to infer a federal constitutional law conflict where one does not exist.

I. THE WISCONSIN SUPREME COURT HAVING NOT PASSED UPON A FEDERAL QUESTION AND PETITIONER NOT HAVING PRESSED ONE, THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(a).

The Wisconsin Supreme Court's decision resolves issues of Wisconsin law. This is scarcely surprising: petitioner pressed no federal question to the state supreme court. In these circumstances, petitioner cannot satisfy the jurisdictional requirements of 28 U.S.C. § 1257(a), and the Court should deny the petition for certiorari. *Cf.* Sup. Ct. R. 14(g).

A. The Wisconsin Supreme Court Did Not Resolve a Question of Federal Right.

The Wisconsin Supreme Court rendered its decision under Wisconsin law. This is clear from its holding: "We conclude that the unit rule the circuit court applied in the present case does not contravene the VFW's state constitutional right to just compensation." Pet. App. 3; *accord* Pet. App. 6, 13, 18, 20.

It is clear otherwise as well from the court's opinion. The Wisconsin Supreme Court opened its analysis with Article I, Section 13 of the Wisconsin Constitution: "Article I, Section 13 of the Wisconsin Constitution provides in full that '[t]he property of no person shall be taken for public use without just compensation therefor.'" Pet. App. 18 (quoting Wis. Const., Art. I, § 13). The bulk of the subsequent legal analysis in the opinion focuses upon the court's comprehensive review of Wisconsin cases applying the unit rule, the acceptance of which, the Wisconsin Supreme Court has elsewhere noted, "is beyond ques-

tion in Wisconsin jurisprudence." *Green Bay Broadcasting Co. v. Redevelopment Authority of Green Bay*, 116 Wis. 2d 1, 11-12, 342 N.W.2d 27, 32 (1983), as modified by, 119 Wis. 2d 251, 349 N.W.2d 478 (1984). The Wisconsin Supreme Court thus followed Wisconsin precedent and upheld the unit rule as an appropriate basis for valuing the Building under the circumstances of this case, rejecting petitioner's argument "that this Court must make an exception to the unit rule in the present case in order to avoid a grossly unjust rule." Pet. App. 23.

To be sure, Article I, Section 13 of the Wisconsin Constitution closely resembles the Fifth Amendment of the United States Constitution ("nor shall private property be taken for public use without just compensation"). For this reason, the Wisconsin Supreme Court made passing reference to some of this Court's cases. *See* Pet. App. 18, 20 nn.18-20. The Wisconsin Supreme Court mentioned *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910), as part of its analysis of the direction Wisconsin cases have taken, *see* Pet. App. 40-41 n.53, just as treatises and law review articles were explored in the opinion.[5]

But even the dissent, upon which petitioner relies heavily, acknowledges that the issue decided by the Wisconsin Supreme Court is one of Wisconsin law.

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[5] In these circumstances, this situation cannot be considered one where state law is "interwoven" with federal law. *See Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). The Wisconsin Supreme Court did not rely upon federal law except "as it would rely upon the precedents of all other jurisdictions." *Id.* at 1041. *See* Pet. App. 19 ("Accordingly, when interpreting and applying Article I, Section 13 of the Wisconsin Constitution, this court long has sought guidance in decisions based on the federal Takings Clause or on analogues in the constitutions of other states.").

The dissent recognizes that the unit rule is Wisconsin state law. *See, e.g.*, Pet. App. 63, 70 & n.11, 72. What the dissent regrets is the court's failure to hold that an exception should arise *under state law*, given what the dissent terms the "unusual" circumstances or "extreme facts" of this case. Pet. App. 55, 72; *see also id.* at 54 (recognizing that an exception to the unit rule under Wisconsin law was at issue). Thus, in advocating for an exception here, the dissent looked to other exceptions that have arisen in Wisconsin's jurisprudence under the rule. *See* Pet. App. 63-72 (citing *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970); *Maxey v. Redevelopment Authority*, 94 Wis. 2d 375, 288 N.W. 2d 794 (1980); *Redevelopment Authority of Green Bay v. Bee Frank, Inc.*, 120 Wis. 2d 402, 355 N.W.2d 240 (1984)).

B. Petitioner Did Not Press a Federal Question for Decision.

Nor did petitioner present a federal takings (or other federal) question before the Wisconsin Supreme Court. Petitioner thus cannot establish that it raised a federal question with "fair precision and in due time," *Adams v. Robertson*, 520 U.S. 83, 88 (1997), or explain when, "both in the court of first instance and in the appellate courts," Sup. Ct. R. 14(g)(i), that question was raised.

Throughout this case, petitioner has affirmatively brought its case under Wisconsin state law. In its pretrial submissions to the circuit court in the case below challenging the award of the Condemnation Commission, petitioner argued only that the unit rule violated Article I, Section 13 of the Wisconsin Constitution. Pet. App. 3. It proceeded similarly in the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

Such an approach is not surprising, since eminent domain law is a state law issue arising as a matter of state sovereignty. *See City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26 (1959). Over the years, the states, consistently with their own bodies of state law, have decided the appropriate way to value property in the circumstances of eminent domain. Some states use juries to determine just compensation; others do not. *See* 5 *Nichols on Eminent Domain*, §§ 17.1[1], 17.1[2] (3d ed. 2007). Some states reduce awards for offsetting benefits in partial-takings cases; others do not. *See* 3 *Nichols on Eminent Domain*, §§ 8A.02-8A.03. Some states make broad provision for relocation benefits that "track" federal law; others make provision for specific benefits that exceed federal law. *See* 6A *Nichols on Eminent Domain*, §§ 34.05[2], 34.07.

Against all this, petitioner offers this as evidence in support of its claim of a "federal" question in the record: In a separate case, before the question of compensation was referred to the Condemnation Commission, petitioner filed a notice of motion with the circuit court seeking "a determination that the application of the unit rule violates the just compensation provisions of §13, Article I, Wis. Const. and the Fifth and Fourteenth Amendment of the United States Constitution" (Pet. App. 114). However, in its briefs filed in support of the motion and in its argument on the motion, petitioner only sought a ruling that use of the unit rule violated the just compensation provision of Article I, Section 13 of the Wisconsin Constitution. The notice of motion stands—with petitioner not pressing or even acting upon the federal argument—as the sole paper of petitioner asserting a

federal claim before the filing of the petition for certiorari with this Court, even though the litigation has proceeded for over 10 years.

Petitioner's failure to "specially set up and clai[m]" a federal right in the courts below forecloses its access to this Court. 28 U.S.C. § 1257(a). Only in "rare" circumstances will the Court hear an issue that was not presented or decided in the state court. *See Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). This case does not present any circumstance justifying a departure from this rule.[6]

II. PETITIONER HAS PRESENTED NO CONFLICT UNDER FEDERAL CONSTITUTIONAL LAW.

Even if the Court somehow concludes that 28 U.S.C. § 1257's requirements are met, the Court should not intercede where—even now—petitioner cannot

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[6] In fact, before the Wisconsin Supreme Court, it was respondent that defensively argued that "due process, law of the case, claim and issue preclusion, and waiver" were further reasons that petitioner should not prevail. Pet. App. 3-4 n.2. As this Court explained in *Adams*, 520 U.S. at 89, petitioner cannot rely upon respondent's discussion of a federal issue to satisfy the requirement that petitioner have raised a federal issue. That is particularly so here, where petitioner did not join issue on those points in its response and where the Wisconsin Supreme Court expressly stated it "need not address additional issues that the [respondent] Redevelopment Authority raises in its briefs to this court in support of its position that the court of appeals erred in reversing the circuit court's judgment." Pet. App. 3-4 n.2. (Of course, those grounds for review would arise again if the case were to be sent back to the Wisconsin Supreme Court because of any action by this Court.) In the end, the Wisconsin Supreme Court rendered its decision based on its interpretation of Wisconsin law and the acceptance of the unit rule in Wisconsin law.

show a *federal* law conflict involving the unit rule. The point is not that state courts apply identical versions of the unit rule in state eminent domain valuation proceedings. It rather is that petitioner has failed to adduce a single case in which any court has decided that application of the rule is unconstitutional *as a matter of federal constitutional law*. In short, there is no conflict warranting this Court's intervention; indeed, there is not even an adequately developed body of federal law.

To begin, the predominant rule of eminent domain valuation followed by the state courts is the unit rule. As the Wisconsin Supreme Court noted, "the unit rule is accepted in the majority of American jurisdictions." Pet. App. 22. Wisconsin's application of the rule is consistent with that of the highest courts of many other states, including those of Alabama, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, and West Virginia.[7] *See* Pet. App. 26-28 n.32, 31 n.38, 36 n.47,

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[7] *See, e.g., Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 5-6 (Ala. 1980); *National Advertising Co. v. State*, 611 So. 2d 566, 569 (Fla. 1993); *City & County of Honolulu v. Market Place*, 517 P.2d 7, 12-14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *J.J. Newberry Co. v. City of East Chicago*, 441 N.E.2d 39, 43 (Ind. Ct. App. 1982); *In re Kansas Turnpike Project*, 317 P.2d 384, 389 (1957)); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 849 (Ky. 1963), *State v. D&J Realty Co.*, 229 So. 2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *Michigan State Highway Comm'r v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Comm'n*, 347 So. 2d 341, 343 (Miss. 1977); *New Jersey Sports Exposition Authority v. East Rutherford*, 348 A.2d 825,

47-48 nn.71-72. Wisconsin's approach is consistent, as well, with numerous decisions of lower federal courts applying federal eminent domain law, including those of the Third, Fifth, and Eighth Circuits.[8]

Of course, states have not all been lockstep in their approach, as the Wisconsin Supreme Court's decision discusses. *See* Pet. App. 24-28 (collecting cases). Thus, in some states, courts have been willing to make exceptions when warranted by particular circumstances. *See, e.g., State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930) (under state constitution and city charter, "exceptional circumstances" may permit adding the value of various interests together to exceed the whole). And a handful of state courts have opted not to apply the unit rule, but instead have determined that a separate valuation approach may be more appropriate. *See, e.g., State v. Platte*

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829 (N.J. Super. Ct. Law Div. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.3d 1214, 1220 (Okla. 2008); *State Highway Comm'n v. Burk*, 265 P.2d 783, 798-800 (Or. 1954); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *Frankfurt v. Texas Turnpike Authority*, 311 S.W.2d 261, 267 (Tex. Ct. App. 1958); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-285 (W.Va. 1968).

[8] *See, e.g., United States v. 6.45 Acres of Land*, 409 F.3d 139, 141, 147-149 (3rd Cir. 2005) (holding that lower court should not have "strayed" from the unit rule); *United States v. 131.68 Acres of Land*, 695 F.2d 872, 875 (5th Cir. 1983) (district court correctly applied the unit rule to valuing sugar cane crop); *Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947) ("general rule of compensation . . . under the Fifth Amendment for the taking of property in fee simple ordinarily is the fair market value . . . of the property . . . irrespective of the number and kinds of interests existing in it").

Valley Public Power & Irr. Dist. 43 N.W.2d 300, 307-308 (Neb. 1946) (holding that state constitutional requirement that property "taken or damaged" receive just compensation supports separate valuation of each property interest); *Wilson v. Fleming*, 31 N.W. 2d 393, 402 (Iowa 1948) (the "opinion [of *State v. Platte*] appeals to us and we are disposed to follow it especially in view of our own decisions"); *Garella v. Redevelopment Authority*, 196 A.2d 344, 348 (Pa. 1964) ("The 1937 statute adopted neither the 'unencumbered fee' nor the 'aggregate of interests' theory"; process must "fix the total amount of damages [and] apportion").

But in none of these decisions has the state court suggested that it is the United States Constitution causing it to deviate from the unit rule. Where state courts have decided to make exceptions to the unit rule or not apply it at all, courts have explained that such a decision is preferred as more in keeping with their own statutes or state constitutions. *See, e.g., City of Baltimore v. Latrobe*, 61 A. 203, 205-206 (Md. 1905) (noting state's "peculiar" ground rent situation, referring to the "State Constitution", and implying that valuation of separate interests independently in exceptional circumstances comes from "State Constitution"); *Arkansas State Highway Comm'n v. Fox*, 322 S.W.2d 81, 82-84 (Ark. 1959) (holding "axiom that whole cannot exceed the parts" was "inapplicable here" in context of state just compensation where property was taken or damaged); *State Highway Dep't v. Thomas*, 154 S.E.2d 812, 816 (Ga. Ct. App. 1967) (state constitution requires that separate interests be valued and total compensation may exceed the whole). *See also United States v. Seagren*, 50 F.2d 333, 334 (D.C. 1931) (permitting tenant to

obtain award for trade fixtures where tenant protected itself with "private stipulation" in lease).

Any such differing minority approaches do not render use of the "unit rule" constitutionally infirm. In the state where an eminent domain proceeding occurs, there is no lack of certainty about the rule that applies in that state. And even where there is a disparity among the valuation of interests, valuation under the unit rule has not been held to be unconstitutional. In short, there is no need for this Court to step in, and any such entry by the Court would not have the benefit of differing federal constitutional analyses in the lower courts.

In the end, all petitioner has shown is that there are variations among the states in the use of the unit rule as a matter of state law. This is, of course, exactly what one would expect to find in a federal system. Petitioner's claim that variations in state constitutional law present a "conflict"[9] warranting intervention by this Court as a matter of federal constitutional law would obliterate the distinction between state and federal constitutional law, very much impoverishing our federal system.

III. THE DECISION BELOW IS CORRECT AND DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE WARRANTING THIS COURT'S REVIEW.

The absence of any conflict in the lower courts is not the only reason that further review is unwar-

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[9] Brief of Amicus Curiae Institute for Justice also weighs in with what it seeks to portray as a "split" in the application of the undivided fee rule or the unit rule. Like petitioner, amicus fails to demonstrate a conflict of federal constitutional law, and thus it adds nothing that warrants this Court's intervention.

ranted. In addition, petitioner can demonstrate no error in the Wisconsin Supreme Court's decision, and it has set forth no appropriate federal rule that would serve as an alternative to the rule applied by the Wisconsin Supreme Court in the decision below.

A. The essential law in Wisconsin is worth restating. The statutes and cases require that a *freehold* be valued according to its "gross value as a single entity as if there were but one owner." *Green Bay Broadcasting Co.*, 116 Wis. 2d at 12, 342 N.W.2d at 33. As explained in *Walgreens Co. v. City of Madison*, 2008 WI 80, ¶ 44, 311 Wis. 2d 158, 752 N.W.2d 687, "leases are encumbrances upon a property's bundl[e] of rights, not part of the bundle itself." In these circumstances, the value, in appropriate cases, may "reflect the value of an unexpired lease terminated by the condemnation," but "contracts between the owners of different interests in the land should not be permitted to result in a total sum which is in excess of the whole value of the undivided fee." *Green Bay Broadcasting Co.*, 116 Wis. 2d at 11, 13, 342 N.W.2d at 32, 33.

Petitioner's challenge rests on the incorrect claim that the unit rule under Wisconsin law (and that of other states) "ignore[s] property interests." Petition at 4, 5.[10] That is not true. When "property that is held in partial estates by multiple owners is condemned, the condemnor pays the fair market value of an undivided interest in the property." Pet. App. 4. In those circumstances, "[a]pportionment of the total

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[10] This, too, is the crux of the Brief of Amici Curiae National Association of Home Builders and Wisconsin Builders Association. Their brief adds nothing further to petitioner's challenge, which is rebutted herein.

sum awarded is then made among the owners." Pet. App. 5. *Compare* Wis. Stat. § 32 (outlining apportionment process between a property owner and a tenant or those with other ownership interests).[11]

The unit rule nearly always works to the advantage of property owners. Where the value of the property can be enhanced by entering into leases or other divisions of ownership, the unit rule takes this into account by valuing the property in its highest and best use prior to condemnation. In contrast, where owners have depressed the value of their property by entering into divisions of ownership that

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[11] It is not the case, as petitioner claims (Pet. 27), that the unit rule "violate[s] due process" when it limits the evidence that can be introduced to a jury determining fair market valuation. Once the lower courts here decided that the unit rule was the applicable rule, petitioner did not have a due process right to a jury hearing to prove the value of the lease as something separate and distinct from the fee, since this was legally irrelevant. *Compare Heckler v. Campbell*, 461 U.S. 458, 461-462, 467 (1983) (Secretary in disability cases, consistently with requirements of due process, may forgo evidence such as testimony from vocational experts where vocational guidelines available); *Gwathmey v. United States*, 215 F.2d 148, 156-157 (5th Cir. 1954) (court invalidates valuation proceeding where hundreds of tracts sought to be valued and evidence presented, without protections, "overwhelmed" jurors); *see generally Santosky v. Kramer*, 455 U.S. 745, 776 n. 4 (1982) (recognizing the "flexibility" in due process requirements and the value added by procedural protections such as evidentiary rules).

By contrast, it is in the *apportionment* process that the lessee may introduce evidence about the value of its lease. Here, petitioner did provide some evidence to that effect in the proceeding before the Condemnation Commission. However, because the jury in this case found that the fair market value of the property was $0, there was no subsequent apportionment proceeding and thus provision of evidence of the value of the leasehold was moot.

would make the property more difficult to sell, thereby reducing its value, the unit rule *ignores* these divisions, and values the property as if it were an undivided fee.

The unit rule resulted in no compensation for petitioner in this case only because Wisconsin, like other states, does not seek to recover the value that an owner obtains when the government condemns property having a negative value.[12] A simple thought experiment shows why this is so. Suppose that shortly before the condemnation, the Maharishi Vedic University had made a gift of the Building to petitioner. Petitioner's lease would merge into the fee. If the Building were condemned, and the jury determined that it had a fair market value of $0, could it be maintained that petitioner was entitled to some positive compensation for the value of the space that it had previously leased in the Building? Clearly not. Five thousand two hundred fifty feet of space on the ground floor of an eleven-story Building cannot be worth more than the entire Building.

As the Wisconsin Supreme Court recognized, the source of protection for a party in the position of petitioner is the law of contract. Petitioner had the opportunity to protect itself against the complained-of eventuality by negotiating a condemnation clause

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[12] Petitioner sets a value of its leasehold as one exceeding $1 million. Pet. 3. However, the record suggests that this was the amount that petitioner would need to buy and own (not lease) new land elsewhere and to construct on that land an entirely new building for its use, Pet. App. 13-14 & n.10, which is not an appropriate measure of fair market value. What is more, query whether a leasehold in an otherwise vacant building that has been declared unfit for human habitation would be worth over $1 million.

that would have protected its below-market lease in the event of a condemnation. It did not do so. As the Wisconsin Supreme Court observed, "[a] condemnation proceeding cannot be used in these circumstances to recover damages that could have been determined by contract between the parties." Pet. App. 40.

Alternatively, petitioner could have availed itself of potential remedies for breach of contract or restitution. For example, petitioner could have asserted a breach of Section C(4) of the lease, which provides that "[t]he building shall comply with all local and State laws, regulations and codes." Resp. App. 4a. Under the terms of that section, petitioner could have expected the owner, Maharishi Vedic University, to maintain a building consistent with the building code and could have sought a remedy in state court when that was not done. Arguably, as well, petitioner could have brought a claim for restitution against Maharishi Vedic University. This owner received a benefit when respondent condemned its vacant and uninhabitable Building and incurred the necessary expense for asbestos removal to prepare the Building for demolition. This windfall arguably came at the expense of petitioner, and gave rise to a cause of action by petitioner against the Maharishi Vedic University for restitution. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft March 31, 2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other.").

Inexplicably, petitioner pursued neither remedy. Instead, petitioner brought suit against the various owners of the Building based on allegations about a clause in the lease that did not exist. *See* Pet. App.

37-39. The suit was dismissed as frivolous. *City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority of Milwaukee*, 2007 WI App. 130, ¶¶ 37-38, 731 N.W.2d 383 (unpublished opinion). The Wisconsin Court of Appeals noted that petitioner had quoted the relevant section of the lease (Section C(4)) in its brief on appeal, but had advanced no argument based on this provision.

Where a contracting party, such as petitioner, has failed to protect its interests by negotiating appropriate lease protections or properly enforcing its common law rights, it should not be allowed to argue that it is entitled to an exception to an established state rule of law, such as the unit rule. Before the Wisconsin Supreme Court, "[petitioner] contend[ed] that this Court must make an exception to the unit rule in the present case in order to avoid a grossly unjust rule." Pet. App. 23. The Wisconsin Supreme Court rejected that argument because petitioner had failed to avail itself of its contractual remedies. This determination, grounded in the application of state law to the peculiar circumstances of this case, was fully warranted.

B. Petitioner also fails to articulate a federal constitutional rule that it would have this Court adopt in order to overturn Wisconsin law and reverse the judgment below. Petitioner does not argue that the unit rule should be discarded in favor of an approach that would require separate valuation of each individual property interest. This has been rejected as administratively burdensome and the generator of great uncertainty by the vast majority of jurisdictions and commentators who have considered the issue.

At times, petitioner appears to claim that federal law requires that Wisconsin recognize "exceptions" to

the unit rule. Whether required or not, Wisconsin does. As the Wisconsin Supreme Court explained in its opinion, "[d]eparture from the unit rule may be made in rare and exceptional circumstances." Pet. App. 30. The Wisconsin Supreme Court recognized that such an exception may be found in other cases, but not in this case. *Id.* In a careful and judicious decision, the Wisconsin Supreme Court considered petitioner's plea for an exception, and determined that it was not appropriate in this case, given the protection that the unit rule provided for the public and the private interests involved and the court's conclusion that the no-compensation result was the product of a poorly drafted lease and petitioner's ineffectual pursuit of a breach-of-contract claim against the fee-owner. *See* Pet. App. 30-40.

What the petition boils down to is a demand that this Court countermand the Wisconsin Supreme Court's careful review of the record, and require as a matter of federal constitutional law that respondent pay some compensation for condemning a lease in an uninhabitable building. This Court does not ordinarily sit to decide whether state courts have correctly granted or denied an exception to state law in highly idiosyncratic circumstances, and it should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

V.F.W. LEASE

THIS INDENTURE, entered into and executed in duplicate, this 28th day of November, 1962, by and between the City of Milwaukee Post No. 2874, Veterans of Foreign Wars of the U.S., a Wisconsin corporation, hereinafter referred to as the Post, and Towne Metropolitan, Inc., a Wisconsin corporation, hereinafter referred to as the Corporation.

The Corporation is possessed of fee title to a parcel of land situated in the City and County of Milwaukee, State of Wisconsin, legally described as follows:

> Part of Lot One (1), Block Two (2) in Assessment Subdivision No. 40, being a Subdivision of Blocks One (1), Two (2), Three (3), Four (4) and Six (6) of Cross and Ludington's Addition (now vacated) in the South West One-quarter (1/4) of Section Thirty (30), in Township Seven (7) North, Range Twenty-two (22) East, in the City of Milwaukee, which is bounded and described as follows, to wit:
>
> Commencing at the North East corner of said Lot 1, running thence West along the North boundary of said Lot 1, which North boundary is coincident with the South line of West Wisconsin Avenue, 153.32 feet to a point, in the West line of said Lot 1, running thence South along the West line of said Lot 1, 159.12 feet to a point; running thence East along a line parallel to the North boundary line of said Lot 1, 48.55 feet to a point; running thence North along a line parallel to the East boundary of said Lot, 9.12 feet to a point; thence East along a line parallel to the North line of said Lot. 134.77 feet to a point, thence

North along the East line of said Lot, 150 feet to the point of commencement,

together with all rights of way, easements, driveways and pavement, curb and streetfront privileges thereunder belonging.

which real estate was conveyed to the Corporation by the Post in consideration of the Corporation's agreement to provide the Post with new quarters of approximately 5250 square feet constructed as part of the hotel building now under construction on such real estate, and the Post, in consideration of the covenants and agreements on the part of the Corporation hereinafter set forth, agrees that this lease shall be substituted for and shall take the place of the original lease dated June 1, 1961 between the Post and the Corporation affecting such real estate, which original lease is hereby absolutely terminated and superseded.

The Corporation, in consideration of the above mentioned conveyance from the Post and in consideration of the substitution of this lease for the aforesaid original lease, does covenant and agree as follows:

A

The Corporation hereby demises and leases unto the Post a certain portion of the above described parcel of real estate, totalling approximately 5250 square feet, for a period of Ninety Nine (99) years, at a rental of one ($1.00) Dollar per year, and hereby grants to said Post an option to extend this lease on the same terms and conditions for another term of 99 years. This lease shall commence upon completion of the new quarters for the Post, in accordance with the terms and conditions hereinafter set forth, but, in no event shall commencement of said leasehold occur

later than September 1, 1963 and the Post premises shall be ready for occupancy on or before that date.

B

The Corporation shall, at its own expense, complete the hotel building now under construction on said real estate and shall provide the Post with an area of approximately 5250 square feet separated from any other portions of building or buildings by solid wall and which shall conform in every respect with the plans and specifications attached hereto as Exhibit A and incorporated herein by reference (hereinafter called the "Plans and Specifications").

C

The following requirements of the post concerning the location, construction, fixtures and equipment of the Post premises, as more particularly shown in the Plans and Specifications shall not be changed without the Post's consent and shall be provided by the Corporation at its sole expense:

(1) The Post premises shall consist of a minimum of 5250 square feet;

(2) The Post premises shall have an entrance lobby on Wisconsin Avenue which will conform and blend with other portions of the building fronting or abutting on Wisconsin Avenue; this area shall be in addition to the 5250 square feet heretofore mentioned;

(3) There shall be installed a properly discernible pole for our National Flag, a suitable, attractive VFW plaque at the Wisconsin Avenue entrance, a suitable Post name sign and appropriate markings on Wisconsin Avenue

and 26th Street, to provide clear public identification of the Post premises;

(4) The building shall comply with all local and State laws, regulations and codes;

(5) A minimum of 3000 square feet of the Post premises will be provided as meeting hall space, with such space to be so constructed that it can be divided into two (2) separate meeting halls, properly lighted. Such meeting hall space shall have a free-spanned acoustical ceiling and the movable partition between the two halls shall be of soundproof construction and material;

(6) All other areas of the Post premise will have acoustical ceilings and will be properly lighted;

(7) The walls, lobby, bar, bar partition and hallway to meeting rooms shall be of hardwood veneer construction, and all others shall be per the Plans and Specifications;

(8) A second entrance to the Post premises will be provided as shown on the Plans and Specifications;

(9) The Post premises will include space completely partitioned for checkroom, lavatory facilities, closet space and storage space, as shown by the Plans and Specifications;

(10) A barroom equipped with a twenty five (25) stool bar, the original 25 stools and refrigerated back bar and walk-in cooler, a kitchen equipped with sinks, refrigerator, stove, formica top work area, cabinets and serving doors opening to the meeting hall and full

heating and air conditioning equipment shall be provided per the Plans and Specifications.

D

As further consideration, the Corporation covenants and agrees as follows:

(1) Post members and their guests may use up to twenty (20) parking spaces in the building parking area at any time. The Corporation may at its option specially mark and designate the spaces to be used by the Post;

(2) The Corporation shall pay any and all real estate taxes on all of the real estate and improvements thereon, commencing June 1, 1961 and continuing through the leasehold term;

(3) The corporation shall furnish and provide all of the heat and air conditioning required by the Post at no expense to the Post. All other electric, telephone, gas, water and other utilities used by the Post shall be paid for by the Post;

(4) The Corporation shall properly repair and maintain the Post premises and fixtures as needed, and shall redecorate the interior at least every seven (7) years;

(5) The Corporation shall replace all major items of equipment furnished by the Corporation (excluding the refrigeration unit of the walk-in cooler) as said equipment requires replacement through normal fair wear and tear.

E

This lease shall be subject and subordinate to any mortgages from time to time placed upon the building and real estate herein described and premises hereby demised and the Post shall, upon the Corporation's request, evidence such subordination of its interest hereunder by executing and delivering such further instrument or instruments evidencing such subordination as may be reasonably required by any mortgagee or mortgagees. It shall be a condition of any subordination hereunder that the mortgagee or mortgagees shall agree that any notices of default required to be given under such mortgage or mortgages to the Corporation as mortgagor, shall also be given to the Post and the Post may perform such mortgage or, as provided in any required notice, cure any defaults by the mortgagor thereunder, and if the Post shall so perform or such default be timely cured by the Post the same shall be deemed to have been performed or cured for all purposes of such mortgage and the Post shall be subrogated in such event to the rights of the mortgagor thereunder. This lease, or a memorandum hereof containing this paragraph in full, shall be recorded as notice of the Post's rights hereunder and interest in the premises hereby demised. It being understood by both parties that the leasehold interest of the Post is and always shall be a vested property right.

F

The Post shall use the Post premises solely for the purposes of its organization and other veteran activities and shall restrict the use of such premises to its members and their invitees, and the same shall not be open to the general public.

G

It is mutually agreed and understood that wherever in this agreement reference is made to approval, or acceptance, or agreement of the Post, that reference is being made to the duly authorized Committee of the Post, to wit: Post Commander, Chairman of the Executive Committee and the Attorney for the Post. It is further mutually agreed and understood by both parties that wherever approval, acceptance or consent is required it shall not be unreasonably withheld

H

It is further mutually understood and agreed that the provisions of this instrument shall inure to the benefit of and be binding upon the parties hereto, their respective successors and assigns, provided however that without the prior written consent of the Corporation (1) the Post shall not sublet any part of the premises leased by it hereunder and (2) the Post's interest as lessee hereunder shall not be the subject of assignment or succession except either to a successor VFW Post or to a comparable veterans' organization which has succeeded to the Post's function either voluntarily or by operation of law. In the event the Post shall cease to exist or shall cease to occupy and operate the Post premises and no comparable veterans' organization shall succeed to its function and assume this lease, all of the Post's rights and privilege hereunder and its interest as lessee herein shall revert to the Corporation.

IN WITNESS WHEREOF, the Post and the Corporation have both duly executed this lease and affixed their respective seals hereto, all being done on the day and year first above written.

AND IN FURTHER WITNESS WHEREOF, the Post has caused these presents to be signed by its Commander, its Agent and Attorney in Fact thereunto authorized and also its Quartermaster who also is its Agent and Attorney In Fact; both such Commander and Quartermaster represent and warrant that they have been given specific authority and direction to execute this lease, and the Corporation has caused these presents to be signed by its President and Secretary thereunto duly authorized, all on the day and date first before written.

In Presence of

CITY OF MILWAUKEE POST NO. 2874, VETERANS OF FOREIGN WARS OF THE U.S.

/s/ Illegible

/s/ John R. Cary
Post Commander

/s/ Illegible

/s/ Harold Hutchinson
Post Quartermaster

TOWNE METROPOLITAN, INC

/s/ Illegible

/s/ Joseph J. Zilber
President

/s/ Illegible

/s/ Illegible
Secretary

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Personally appeared before me this 28th day of November, 1962, the above named John R. Cary and Harold Hutchinson to me known to be the Post Commander and Post Quartermaster of the City of Milwaukee Post No. 2874, Veterans of Foreign Wars

of the U.S., hereinbefore referred to as the Post, and to me known to be the persons who executed the foregoing instrument and acknowledged the same as their free act and deed.

/s/ [Illegible]
Notary Public, Milwaukee County, Wisconsin
My commission expires 4-5-65

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Personally came before me, this 28th day of November 1962, Joseph J. Zilber President, and [Illegible], Secretary of the above named Corporation, TOWNE METROPOLITAN, INC. to me known to be such President and Secretary of said Corporation, and acknowledged that they executed the foregoing instrument as such officers as the deed of such corporation, by its authority.

/s/ [Illegible]
Notary Public, Milwaukee County, Wisconsin
My commission expires 4-5-65

Supreme Court, U.S.
JUN 2 - 2010
OFFICE OF THE CLERK

No. 09-1204

IN THE
Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES, *Petitioner*,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE, *Respondent*.

On Petition for Writ of Certiorari to the Supreme Court of Wisconsin

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

There are two core issues presented in the Petition for Certiorari. The first issue deals with the controlling effect of *Boston Chamber of Commerce v. Boston*, 217 U.S. 189 (1910), a case discussed at some length by the courts below.[1] The second issue is the utter denial of due process to Petitioner Veterans of Foreign Wars (VFW) by allowing it to present *no testimony at all* regarding the value of the remaining century and a half of its lease in the building being condemned.

The Redevelopment Authority's Brief in Opposition barely mentions the first issue and wholly ignores the second.

To the extent that Respondent asserts that no federal issue was raised or decided below, the record is contrary. If nothing else, the number of basic 5th Amendment decisions of this Court relied on below (twelve in the majority and twenty in the dissent, plus Federal Circuit Court decisions in both) shows

[1] The Court of Appeals expressly followed this Court's *Boston Chamber* decision and held that the Wisconsin procedure was unconstitutional. (Pet. App. 96.) The Supreme Court analyzed *Boston Chamber*'s subsequent interpretation by this Court (Pet. App. 40-48), concluded that it was "not persuasive" (Pet. App. 41) and refused to follow it.

otherwise. (See *Oregon v. Kennedy* 456 U.S. 667, 671 [1982].)

The Petition presents a classic conflict of decisions in the state courts on an issue that should have a uniform constitutional base. As the Court has often said, the 5th Amendment provides a floor of protection that *all* states must provide, although they may provide more. (E.g., *Kelo v. City of New London*, 545 U.S. 469, 489 [2005]; *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 676-677 [1923].)

This case takes the "undivided fee rule" into *reductio ad absurdum* territory. Respondent cites no case, for to the best of our knowledge there is none, in which the "undivided fee rule" was used not just to *reduce* a party's just compensation, but to *eliminate* it altogether. Whatever that may be, it is not the constitutionally mandated "just compensation."

I.

THE FEDERAL QUESTION WAS RAISED AND DECIDED.

It is a mystery how the Redevelopment Authority can say that the federal question was not raised. (Br. in Opp. 2.) Plainly, it was raised; *the Wisconsin Supreme Court expressly said it was.* (Pet. App. 40 [discussing VFW's

reliance on this Court's decision in *Boston Chamber*].) That should be the end of the matter, but there is more.

The Wisconsin Court of Appeals decided the case in VFW's favor because of its conclusion that *Boston Chamber* showed the undivided fee rule was unconstitutional on these facts. (Pet. App. 96.) That is the opinion that was being reviewed by the Wisconsin Supreme Court, which reversed and decided not to follow this Court's application of the 5th Amendment. (Pet. App. 41-48.) Its discussion necessarily examines *Boston Chamber* and some of this Court's decisions following *Boston Chamber* (particularly *Brown v. Legal Found. of Washington*, 538 U.S. 216 [2003] [Pet. App. 43-45] and *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 [1999] [Pet. App. 44]) in concluding that it would disregard this Court's decisions in favor of its own.[2]

Where a state supreme Court opinion relies substantially on this Court's decisions (*Oregon v. Kennedy*, 456 U.S. 667, 671 [1982]), or where the state and federal decisions are "interwoven" so that it cannot be said that

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[2] Recall that two of the majority in this 4-3 decision separately concurred in order to make clear that "*our* precedent requires" the result. (Pet. App. 51; emphasis added.)

there is an adequate and independent state basis for the decision (*Michigan v. Long*, 463 U.S. 1032, 1040 [1983]), then the presence of a federal question is not open to doubt.

That would seem even more true here, where the Wisconsin court deliberately (1) analyzed, and then (2) rejected this Court's decisional law interpreting the 5th Amendment, before (3) substituting for that its own interpretation of Wisconsin's mirror image constitutional provision. If all any state court needed to do in order to "cert proof" its decision was to *say* it was relying wholly on such a mirror image provision, thereby evading this Court's settled determinations, then this Court's primacy in Federal Constitutional interpretation would be mortally undermined.

II.

STATE SUPREME COURTS ARE SPLIT ON THE CONSTITUTIONALITY OF THE UNDIVIDED FEE RULE.

As shown in the Petition, state court decisions have split three ways in evaluating the constitutionality of the undivided fee rule. All of these courts are measuring the rule against either the 5th Amendment or state constitutional mirror image provisions. Their

answers to the question whether the undivided fee rule is constitutional are either "yes," "no," or "it depends." (Pet. 11-17.) This crazy quilt is anything but what the Redevelopment Authority terms "a reasonably well-settled body of state law...." (Br. in Opp. 10.)

The Redevelopment Authority's assertion that none of the cases cited in the Petition held the undivided fee rule unconstitutional as a matter of federal constitutional law (Br. in Opp. 16) merely shows that the Authority failed to examine the cases cited in the Petition (even though it cited the same cases itself (Br. in Opp. 17-18). Those state cases show (1) some that relied on this Court's decisions and (2) others that rejected this Court's decisions, thus demonstrating the need for intervention and clarification now.

Arkansas, for example, rejected the undivided fee rule because it agreed with *Boston Chamber*. (*Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 287, 289 [Ark. 1959].) Likewise, California, in rejecting a knee jerk application of the rule. (*People ex rel. Dept. Pub. Wks. v. Lynbar, Inc.*, 253 Cal.App.2d 870, 882 [Cal. App. 1967].) On the other hand, in adopting the undivided fee rule, Kansas simply dismissed this Court's jurisprudence under the rubric of "[f]or contrary holdings see...." (*Moore v. Kansas Turnpike Auth.*, 317

P.2d 384, 390 [Kans. 1957].) And in Nevada, *Boston Chamber* is relied on by the dissent, to show the error of the majority's ways. (*County of Clark v. Sun State Properties, Ltd.*, 72 P.3d 954, 964 [Nev. 2003].)

What the review of state cases shows is only that there is confusion in the application of the 5th Amendment to the undivided fee rule. It is time for this Court to intervene. Otherwise, the state-to-state chaos will continue, with states feeling free to comply or not with 5th Amendment jurisprudence when they choose to do so.

In fact, absolute application of the undivided fee rule (as practiced in Wisconsin) lends itself to precisely the abuse shown in this case: Milwaukee, by failing to enforce its own codes against the building owner and then refusing to allow any tenants besides VFW to occupy the building, caused the dilapidation that eventually served as its justification for a $0 value on the date of taking. And then, as the building was worth nothing, it used the undivided fee rule to provide no compensation to VFW, the victim caught between the city's lack of enforcement and its desire to have something else on the site.

Nothing in the Respondent's briefing can undercut the existence of the three-headed

(yes/no/maybe) state court disagreement as to the import of the 5th Amendment. Nor is there validity to the Redevelopment Authority's assertion that granting this Petition "would obliterate the distinction between state and federal constitutional law...." (Br. in Opp. 19.)[3] All that VFW asks of this Court is that it enforce the 5th Amendment as the "federal baseline," (*Kelo*, 545 U.S. at 489) beneath which states may not go.

III.

THE REDEVELOPMENT AUTHORITY IGNORES VFW'S DUE PROCESS RIGHTS HERE, AS IT DID BELOW.

The Redevelopment Authority confines the entirety of its due process argument to a footnote. (Br. in Opp. 21, n. 11.) That shrift is about as short as the Authority gave VFW in the proceedings below.

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[3] The Redevelopment Authority overlooks Art. 6 , cl. 2 of the U.S. Constitution, which makes that organic document "the supreme law of the land...anything in the Constitution...of any State to the contrary notwithstanding." Where there is a "distinction" between state law and the U.S. Constitution on the same point of law, the latter controls.

The argument is a bootstrap which only reinforces the need for this Court's review. To make this point, one cannot improve on the Respondent's own words:

> "Once the lower courts here decided that the unit [or undivided fee] rule was the applicable rule, *petitioner did not have a due process right to a jury hearing* to prove the value of the lease as something separate and distinct from the fee, since this was legally irrelevant." (Br. in Opp. 21, n. 11; emphasis added.)[4]

For once, VFW and the Redevelopment Authority are in agreement: the upshot of application of the undivided fee rule is that VFW's due process right to present evidence of value was made to vanish. But that is as far as the agreement goes. Respondent's position overturns this Court's jurisprudence (see Pet. 27-30), which may explain why none of the cases discussed there are mentioned in the

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[4] Thus, in Respondent's hands, the "undivided fee rule" acquires such magic potency that it eliminates not only the authority of this Court's directly on-point holding, but also a condemnee's due process right not to have its case disposed of without an opportunity to be heard and present evidence.

Brief in Opposition. The point was succinctly made by this Court in an eminent domain case nearly a century ago:

> "[I]t is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." (*Bragg v. Weaver*, 251 U.S. 57, 59 [1919].)

The Redevelopment Authority's idea of due process is likewise laid out plainly in that footnote: what happened to VFW, says Respondent, was not only fair, but was also the logical upshot of applying the undivided fee rule:

> "[I]t is in the *apportionment* process that the lessee may introduce evidence about the value of its lease....However, because the jury in this case found that the fair market value of the property was $0, *there was no subsequent apportionment proceeding* and thus provision of evidence of the value of the leasehold was moot." (Br. in Opp. 21, n. 11; initial emphasis in original; final emphasis added.)[5]

---

[5] Compare *Clayton v. County of Los Angeles*, 26 Cal.App.3d 390, 394-395, n. 6 (Cal.App. 1972),

Thus, the Redevelopment Authority's defense of the Wisconsin Supreme Court's award of $0 compensation is that the undivided fee rule not only made them do it, but application of that rule also caused any due process rights VFW may have possessed to vanish like smoke.[6]

If nothing else, Respondent's defense of the undivided fee rule — application of which caused the elimination of both due process and just compensation rights at a single blow — is a cry for this Court to grant certiorari.

---

observing that it would be an absurdity for a court to substitute an apportionment proceeding for a valuation trial where the latter produces insufficient funds to compensate the owner of each property interest being taken.

[6] The Redevelopment Authority's appraisal assertions are nothing but *ipse dixit*. As revealed truth, the Redevelopment Authority asserts that "Five thousand two hundred fifty feet of space on the ground floor of an eleven-story Building cannot be worth more than the entire Building." (Br. in Opp. 22.) In fact, courts have come to precisely the conclusion derided by Respondent. (E.g., *State v. Platte Valley Pub. Power & Irr. Dist.*, 23 N.W.2d 300, 307-308 [Neb. 1946]; *City of Baltimore v. Latrobe*, 61 A. 203, 206 [Md. 1905]; see *Gallatin Housing Auth. v. Chambers*, 362 S.W.2d 270, 276 [Tenn. App. 1962] [applying *Bauman v. Ross*, 167 U.S. 548 [1897].)

CONCLUSION

The Brief in Opposition flags the central point directly: "the Wisconsin Supreme Court's decision was the product of adherence to 'Wisconsin's precedent.'" (Br. in Opp. 9.)

Just so. Wisconsin insisted on substituting its own precedent for this Court's precedent — all while ostensibly seeking to comply with the 5th Amendment's just compensation guarantee. Certiorari is needed to determine whether a state can dismiss this Court's precedent as "not persuasive," denying just compensation as well as eliminating a litigant's right to due process of law.

Respectfully submitted,

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In The Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES,

Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the Just Compensation Clause of the Fifth Amendment permit Wisconsin to use the "undivided-fee" rule to completely deny a leaseholder any compensation whatsoever for the taking of its property?

2. Does the Due Process Clause of the Fourteenth Amendment allow states to deny owners any compensation whatsoever for the taking of their property without allowing them to present any evidence of its value?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a non-profit, public interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights.

IJ is the nation's leading legal advocate against the abuse of eminent domain. IJ represented the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005) and in many other federal and state eminent domain cases throughout the country. In its work representing and assisting condemnees, IJ has seen the profound effects of eminent domain on businesses and institutions that lease their premises. It has seen, too, the lack of uniformity in the treatment of condemnees and how that affects their continued survival. IJ therefore has an interest in the development of a consistent rule of law on what constitutes just compensation, so that courts can

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[1] This brief is filed pursuant to the written blanket consents on file with this Court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

protect people, businesses, and institutions that are forced to undergo eminent domain.

STATEMENT OF THE CASE

The *Amicus Curiae* incorporates by reference the description of the facts outlined in the petition for writ of certiorari. Pet. for Cert. at 6-10.

REASONS FOR GRANTING THE PETITION

This case presents an excellent opportunity for this Court to address an important unresolved issue of constitutional law, one that has caused a deep division among state supreme courts. The question is the status of the "undivided-fee" rule under the Just Compensation Clause of the Fifth Amendment. The rule, sometimes also referred to as the "unit rule," holds that when a property in which more than one owner has an interest is condemned, compensation will be awarded as if the land in question belonged to only one person.

Some state supreme courts have applied this rule categorically, others reject it, and still others have accepted it only partially. Overall, some twenty-eight state supreme courts have ruled on the question, as have several federal circuit courts. Their approaches

vary greatly.[2] This split of authority has led to enormous confusion and regional variation over an important constitutional issue.

The application of the undivided-fee rule in many states severely undermines the constitutional property rights of leaseholders that hold interests for which they pay below-market rent. Such arrangements are especially common among non-profit organizations and charities, including churches. Non-profits often rent property for below-market rent when landowners are willing to allow them to do so out of charitable impulses. Relatively poor and politically weak non-profits are especially vulnerable, since such organizations are often targeted for condemnation by local governments seeking to increase tax revenue or satisfy the demands of politically influential interest groups that covet their land. Small businesses also often lease property at below-market rates, as do many poor individuals who obtain such arrangements with the aid of charities or government agencies.

The use of the undivided-fee rule also often leads to the troubling result that owners of leasehold interests get little or no compensation for the loss of their property. It severely undermines the long-standing principle that "'[j]ust compensation' . . . means in most cases the fair market value of the property on the date it is appropriated." *Kirby Forest*

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[2] See cases cited in Part I, *infra*.

Indus. Inc. v. United States, 467 U.S. 1, 10 (1984) (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511-13 (1979)).

The rule further runs counter to the principle that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). When a property owner is denied compensation for the taking of his property because of the undivided-fee rule, he is unquestionably "alone . . . bear[ing] a public burden." *Id.*

The Court should also grant a writ of certiorari on the Veterans of Foreign War's Due Process Clause claim. By holding that the VFW had no right to present evidence of the value of their condemned property, the Wisconsin Supreme Court went against Supreme Court precedent and created a split of authority with the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

I. THERE IS A MAJOR SPLIT OF AUTHORITY BETWEEN THE HIGHEST COURTS OF NUMEROUS STATES, AND SEVERAL FEDERAL COURTS OF APPEAL.

State supreme courts and several federal circuit courts are deeply divided over the application of the

undivided-fee rule in takings cases. Sixteen state supreme courts and lower courts in two other states apply the undivided-fee rule rigidly, as the Wisconsin Supreme Court did in the present case.[3] By contrast, six state supreme courts and the United States Court of Appeals for the District of Columbia Circuit, have held that it violates the Just Compensation Clause.[4]

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[3] *Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 6 (Ala. 1980); *Nat'l Adver. Co. v. State*, 611 So. 2d 566, 569 (Fla. Dist. Ct. App. 1992); *City & County of Honolulu v. Market Place, Ltd.*, 517 P.2d 7, 14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *State v. Montgomery Circuit Court*, 157 N.E.2d 577, 578 (Ind. 1959); *Moore v. Kan. Tpk. Auth.*, 317 P.2d 384, 390 (Kan. 1957); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 848 (Ky. 1963); *State v. D&J Realty Co.*, 229 So. 2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *State Highway Comm'r v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Comm'n.*, 347 So. 2d 341, 343 (Miss. 1977); *N.J. Sports & Exposition Auth. v. Borough of East Rutherford*, 348 A.2d 825, 829-30 (N.J. Super. Ct. Law Div. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.3d 1214, 1220 (Okla. 2008); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-85 (W.Va. 1968); *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.W.2d 749, 759 (Wis. 2009).

[4] *Arkansas State Highway Commn. v. Fox*, 322 S.W.2d 81, 82-83 (Ark. 1959); *United States v. Seagren*, 50 F.2d 333, 335 (D.C. Cir. 1931) (appeal from the Supreme Court of the District of Columbia); *City of Des Moines v. Housby-Mack, Inc.*, 687 N.W.2d 551, 553 (Iowa 2004); *City of Baltimore v. Latrobe*, 61 A. 203, 206 (Md. 1905); *State v. Platte Valley Pub. Power &*

(Continued on following page)

Finally, courts in several states (including six state supreme courts),[5] as well as five federal circuit courts,[6] use the undivided-fee rule as a rule of convenience but depart from it when it would lead to inadequate compensation.

In deciding whether to grant the writ of certiorari, this Court gives preference to cases where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a

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Irrigation Dist., 23 N.W.2d 300, 311-12 (Neb. 1946); *Garella v. Redevelopment Auth* , 196 A.2d 344, 348 (Pa. 1964).

[5] *Alaska State Housing Auth. v. DuPont*, 439 P.2d 427, 431 (Alaska 1968); *People ex rel. Dep't of Pub. Works v. Lynbar, Inc.*, 62 Cal. Rptr. 320, 327 (Cal. Ct. App. 1967); *State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930); *State v. Hy-Grade Auto Court*, 546 P.2d 1050, 1053-1054 (Mont. 1976); *State v. Cowan*, 103 P.3d 1, 4 (Nev. 2004); *State v. Burk*, 265 P.2d 783, 801 (Ore. 1954); *Gallatin Hous. Auth. v. Chambers*, 362 S.W.2d 270, 275-76 (Tenn. Ct. App. 1962); *State v. Ware*, 86 S.W.3d 817, 824 (Tex. App. 2002); *State v. Spencer*, 583 P.2d 1201, 1205 (Wash. 1978).

[6] *United States v. 6.45 Acres*, 409 F.3d 139, 147-48 (3d Cir. 2005) (holding that the rule is not "to be applied rigidly"); *United States v. 499.472 Acres*, 701 F.2d 545, 549 (5th Cir. 1983) (holding that "where required by the special circumstances of the case" unit rule need not be used); *United States v. Corbin*, 423 F.2d 821, 828 (10th Cir. 1970) (finding that "the aggregation of the values of the separate components seems to be the most logical manner of stating the ultimate award"); *United States v. City of New York*, 165 F.2d 526, 528 (2d Cir. 1948) (L. Hand, J.) (noting that the unit rule is not authoritative); *Nebraska v. United States*, 164 F.2d 866, 868-69 (8th Cir. 1947) (holding that the "rule is not . . . autocratically absolute").

United States court of appeals." SUP. CT. R. 10(b). It is difficult to imagine a more extensive and confusing split among lower courts over "an important federal question" than this one. Some twenty-eight state supreme courts and six federal circuit courts have ruled on the issue. They have come up with at least three distinct approaches.

In the present case, the Wisconsin Supreme Court acknowledged that "[s]everal courts in other states have, as the VFW urges, departed from the unit rule when the aggregate value of partial interests in the condemned property exceeds the value of an undivided interest." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 768 N.W.2d 749, 760 (Wis. 2009). It cited some of the numerous divergent cases from other jurisdictions. *Id.* at 760-61.

The discord in the states over this issue undermines the crucial function of the Constitution as a uniform national baseline of fundamental rights that all states must respect. As Justice Joseph Story explained, one of the most important reasons why this Court has ultimate jurisdiction over federal constitutional issues is "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.) (emphasis in original).

Uniformity with respect to the Just Compensation Clause of the Fifth Amendment is particularly important because this Court has long emphasized the essential nature of this provision. It has refused to defer to state governments in setting compensation, even as it has given them more leeway on other issues related to the Takings Clause. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 488-90 (2005) (refusing to "second guess" state determinations that a particular taking serves a "public purpose" sufficient to justify condemnation under the Public Use Clause). As Professor James W. Ely, Jr., a prominent historian of constitutional property rights points out, "[f]ederal courts have long insisted that the determination of just compensation for a taking of property is a judicial, not a legislative, responsibility." James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUP. CT. REV. 39, 63. Since at least the Nineteenth Century, this Court has emphasized the importance of uniformity in this area, and the minimal scope of deference due to state and federal legislative decisions regarding compensation:

> It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

Just as legislatures cannot determine "what shall be the rule of compensation" under the Fifth Amendment, *id.*, state courts also cannot create wildly inconsistent rules of compensation under the Fifth Amendment. The Constitution cannot tolerate such profound divergence in the application of a crucial principle of the Bill of Rights.

The present case is an excellent vehicle for resolving this ambiguity because the facts are extremely clear. "[I]t is undisputed that the leasehold interest [that the VFW lost to condemnation] is of great monetary value." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 746 N.W.2d 536, 543 (Wis. Ct. App. 2008), *rev'd*, 768 N.W.2d 749 (Wis. 2009). And there is no doubt that compensation was denied because of the Wisconsin Supreme Court's application of the undivided-fee doctrine.

II. THE RESOLUTION OF THIS ISSUE IS IMPORTANT TO NUMEROUS NON-PROFIT, SMALL BUSINESS, AND LOW-INCOME LEASEHOLDERS AROUND THE COUNTRY.

The application of the undivided-fee rule to cases like this one imperils the interest of many leasehold owners around the country. Non-profit organizations,

small businesses, and other leaseholders lacking in political influence are particularly at risk.

It is common for non-profit organizations such as churches, charities, and veterans groups (including the VFW) to rent property at rates below-market value; sometimes, they are able to rent for a merely nominal price, as occurred in the present case where the VFW paid only $1 per year in rent for the lease in question. Landowners frequently donate below-market value leases to such organizations out of charitable impulses, or even allow them to rent land virtually for free.[7] The same is also true of low income

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[7] *See, e.g.*, Peter Goonan, *Social Center Signs $1 Lease*, THE REPUBLICAN (Springfield, Mass.), Feb. 23, 2010, *available at* http://www.masslive.com/springfield/republican/index.ssf?/base/news-27/126691523080170.xml&coll=1 (non-profit community organization gets $1 per year annual rent for valuable property in Springfield, Massachusetts); Larry Rohter, *Avant Garde Film Group Gets New Home, Cheap*, N.Y. TIMES, May 27, 2009 (heavily discounted lease for non-profit Film-Makers' Cooperative in New York City); Kimbriel Kelly, *Native American Art Gallery Proposed*, CHI. DAILY HERALD, Sept. 15, 2004, at C5 ($1 per year lease for non-profit art gallery); *OU Trustees Approve Controversial $1 Lease For Retirement Community Site*, ATHENS NEWS (Athens, Ohio), June 27, 2004 ($1 per year lease on an 80 acre property for non-profit retirement community), *available at* http://www.athensnews.com/news/local-news/14586-ou_trustees_
approve_controversial_1_lease_for; Alex Hummel, *Vet Museum Start Pushed Back*, OSHKOSH NORTHWESTERN (Oshkosh, Wis.), Aug. 4, 2003, at 1C ($1 per year 99 year lease for non-profit veterans museum).

renters who sometimes get below-market leases with the aid of charities or government agencies.[8]

Small businesses also often secure below-market rents. *Amicus* Institute for Justice is aware of many situations where a small business operates under a favorable lease because the business spotted an up-and-coming area before anyone else did, because the tenant has renewed a long-term lease, because the landlord and tenant have a business venture together, or simply because the landlord and tenant are friends. Any tenant with favorable below-market lease terms will suffer when the government exercises eminent domain and the tenant is unable to find another property to rent on comparable terms.[9]

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[8] *See, e.g.*, Kieran Nicholson, *Carrying On After Life Carried Off A Resettled Katrina Evacuee Faces Losing Her New Home While Fighting For An Insurance Claim, Still, She's Grateful For Each Day*, DENVER POST, Aug. 29, 2007, at 1 (heavily discounted leases for Hurricane Katrina refugees).

[9] *See, e.g.*, John Warren, *City May Be Building Dredge Site Where Shopping Center Sits*, VIRGINIAN-PILOT, Sept. 28, 2008 (tenants acquired long-term leases for retail stores before area became more popular); Dan O'Kane, *Caddie Improves Kuehne's Game*, TULSA WORLD, June 6, 1999 (golf driving-range had below-market lease from family friend); Maria Galo, *Condo Plan Threatens Cosmetology School Lease*, CHI. TRIBUNE, July 7, 2000 (school had long term lease at below-market rates); Dan Monk, *Another Eminent Domain Fight Gets Ugly*, BUS. COURIER (Cincinnati, Ohio), May 21, 2004 (new lease for chili restaurant would be three times rent from family member at current location).

In such situations, it can easily happen that the non-profit lessee's interest is worth more than the fair market value of the property in question as an undivided unit. The property taken as a whole may have relatively little value because of encumbrances, regulatory violations, or other factors that do not materially diminish the value of the non-profit's leasehold.

Non-profit institutions are particularly likely targets for the sorts of "economic development" takings that this Court ruled to be constitutional in *Kelo v. City of New London*, 545 U.S. 469 (2005). Because non-profits generally do not pay taxes on their property and often produce little in the way of economic development, they make tempting targets for local governments hoping to increase tax revenue or to boost the regional economy. *See Br. for Becket Fund for Religious Liberty as Amicus Curiae Supporting Pet'rs, Kelo v. City of New London*, 545 U.S. 469 (2005), (No. 04-108), 2004 WL 2787141, at *8-11 & n.20 (explaining the special vulnerability of religious non-profits and listing numerous examples where they have been targeted by economic-development takings). For example, numerous churches and other non-profit institutions were condemned in the notorious 1981 *Poletown* case in Detroit, where an entire neighborhood was taken in order to clear the way for a new General Motors

factory.[10] Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use*, 2004 MICH. ST. L. REV. 1005, 1017-18 (2004). Property owned or rented by poor and politically weak individuals is also often targeted for condemnation for transfer to politically influential interest groups. *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after Kelo*, 15 SUP. CT. ECON. REV. 183, 190-203, 267-71 (2007) (describing some of the reasons why this occurs); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 Yale L. & Policy Rev. 1 (2003) (discussing history of condemnation of property occupied by the poor and politically weak minority groups).

Property leased by non-profit institutions is also often exempt from taxation, and generally does not produce as much economic development as that used for commercial purposes. *See, e.g., Most Worshipful Grand Lodge of Free & Accepted Masons v. Norred*, 603 So. 2d 996, 1000 (Ala. 1992) (holding that property tax exemption is based on "the *exclusive use* of the property at issue for religious worship, schools, or charity" and that "[g]enerally, who owns the property at issue is unimportant"); *West Brandt*

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[10] This condemnation was upheld by the Michigan Supreme Court in *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), *overruled by County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

Found., Inc. v. Carper, 652 P.2d 564, 567 (Colo. 1982) ("Eligibility for exemption is determined by examining the use to which the property is put, not the character of the owner").

When property leased by non-profit institutions is condemned, as happens all too often, non-profit organizations need compensation in order to be able to continue their operations elsewhere. And they may not get it if the undivided-fee rule applies. The same is true of numerous small businesses and low-income renters who benefit from below-market rents.

III. THE UNDIVIDED-FEE RULE CONFLICTS WITH BASIC PRINCIPLES OF JUST COMPENSATION EMBEDDED IN THIS COURT'S PRECEDENTS.

"[T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316 (1987). The level of compensation is generally determined by "the fair market value of the property on the date it is appropriated." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984).

In the present case, the VFW's property right was unquestionably taken by the government and "it is undisputed that the leasehold interest is of great monetary value. *City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth.*, 746

N.W.2d 536, 543 (Wis. Ct. App. 2008), *rev'd*, 768 N.W.2d 749 (Wis. 2009).[11] Yet the VFW was denied fair market value compensation for the condemnation of its property interest. Indeed, it received no compensation whatsoever. Pet. for Cert. at 1.

The application of the undivided-fee rule to this case undermines two longstanding principles that lie at the core of the Just Compensation Clause. These include the mandate of fair market value compensation and the rule that the Clause is intended to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A. The Undivided-Fee Rule Violates The Rule That Owners Of Condemned Property Are Entitled To Fair Market Value Compensation.

The Supreme Court has repeatedly held that fair market value is the usual method for estimating the compensation due to owners of condemned property. *See, e.g.*, *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984); *United States v. 50 Acres of Land*,

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[11] The Wisconsin Supreme Court questioned elements of the VFW's estimate of the lease's value, but nonetheless "accept[ed] for purposes of our review the VFW's contention that its leasehold interest had value." *City of Milwaukee Post No. 2874 Veterans of Foreign Wars*, 768 N.W.2d at 755 n.10.

469 U.S. 24, 29 (1984); *United States v. Miller*, 317 U.S. 369, 374 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934). "Deviation from this measure of just compensation has been required only 'when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public.'" *50 Acres of Land*, 469 U.S. at 29 (quoting *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950)). No such deviation is necessary in the present case.

Leasehold interests are property and their condemnation by the government must be compensated just like that of other property rights. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945); *A.W. Duckett & Co. v. United States*, 266 U.S. 149, 151 (1924). "The constitutional provision is addressed to *every* sort of interest the citizen may possess." *Gen. Motors*, 323 U.S. at 378 (emphasis added).

When a leasehold interest is condemned, "[t]he measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew [if any] . . . less the agreed rent which the tenant would pay for such use and occupancy." *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946). In this case, therefore, the appropriate measure of fair market value compensation would have been the value of the remaining years left on the VFW's ninety-nine year term, minus the $1 per year rent.

By applying the undivided-fee rule, the Wisconsin Supreme Court unquestionably denied fair market value compensation to the VFW. Indeed, it denied it any compensation whatsoever.

It is irrelevant that the value of the building considered as an undivided interest might be less than sum of the individual interests that belong to different owners. As Justice Oliver Wendell Holmes emphasized in his classic opinion for this Court in *Boston Chamber of Commerce v. City of Boston*, "the Constitution does not require . . . a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole." 217 U.S. 189, 195 (1910). Courts must assess the value of the interest taken from each individual separately because the Just Compensation Clause "deals with persons, not with tracts of land." *Id.*

B. The Undivided-Fee Rule Forces Individual Property Owners To Bear Public Burdens That Should Be Borne By The Public As A Whole.

The undivided-fee rule also violates this Court's Just Compensation Clause doctrine by "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court has consistently "emphasized [the] role" of the Takings Clause in enforcing this principle. *Lingle v. Chevron, Inc.*, 544 U.S. 528, 537 (2005); *see*

also Palozzolo v. Rhode Island, 533 U.S. 606, 617-18 (2001) (noting that "the purpose of the Takings Clause . . . is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (quoting *Armstrong v. United States,* 364 U.S. at 49)).

The application of the undivided-fee rule to cases such as the VFW's is a particularly egregious violation of the principle that lies at the heart of "the purpose of the Takings Clause." *Palozzolo*, 538 U.S. at 617-18. In such cases, owners of leasehold interests are forced to bear a grossly disproportionate share of the burden of the public project facilitated by condemnation, while receiving little or no compensation for their losses. In the VFW's case, there was no compensation at all. The VFW lost some fifty-nine years of a valuable leasehold interest whose value the Wisconsin Court of Appeals estimated at roughly $300,000. Pet. for Cert. at 8-9.

Under the ruling below, therefore, the VFW will be forced to shoulder a substantial part of the cost of the public use for which its property was condemned and in exchange will receive literally nothing. Other similarly situated lessees find themselves in the same position. They too bear a burden that the Just Compensation Clause was created to spread to the public as a whole.

IV. THE COURT SHOULD ALSO GRANT A WRIT OF CERTIORARI ON THE PETITIONER'S DUE PROCESS CLAUSE CLAIM.

The Wisconsin Supreme Court ruled that the VFW had no right to present any evidence to the jury on the value of its property interest that the government had condemned. This ruling conflicts with this Court's precedents and creates a potential split with United States Court of Appeals for the Fifth Circuit.

A. The Due Process Clause Gives Property Owners The Right To Present Evidence Of The Value Of Their Property In Eminent Domain Proceedings.

This Court has emphasized that "[t]he right to present evidence is . . . essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). That is especially true in situations "where government action seriously injures an individual, and the reasonableness of the action depends on fact findings." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). In such cases, "the evidence used to prove the Government's case must be disclosed to the individual so that he has *an opportunity to show that it is untrue.*" *Id.* (emphasis added). In this case, the government's action in refusing to pay compensation undoubtedly "seriously injured" the VFW, and the reasonableness of that action depended at least in part on factual findings regarding the value of the VFW's interest.

Yet the VFW had no "opportunity to show" that the government's claims were "untrue" because Wisconsin courts prevented it from presenting any evidence to contest that of the government. *Id.*

This Court has held that the Due Process Clause applies to eminent domain compensation determinations, emphasizing that "it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard." *Bragg v. Weaver*, 251 U.S. 57, 59 (1919). The same due process requirements that apply to other litigation apply to Just Compensation Clause cases. Thus, the Wisconsin Supreme Court's decision in the present case runs counter to this Court's interpretation of the Due Process Clause.

B. The Wisconsin Supreme Court Creates A Split With The Fifth Circuit.

The Wisconsin Supreme Court's decision on the due process issue creates a split with the Fifth Circuit Court of Appeals. In *Gwathmey v. United States*, 215 F.2d 148 (5th Cir. 1954), the Fifth Circuit invalidated a condemnation proceeding in which the government sought to condemn 236 properties at once and did not allow each individual owner to present evidence of the value of his particular property. *Id.* at 151, 154-57. The Fifth Circuit held that "the individual landowner's Constitutional right to due process and just compensation" requires an opportunity to present evidence of the value of his or her specific property.

Id. at 156; *cf. United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1314 (11th Cir. 2009) ("A court may violate constitutional due process if it chooses an adjudication mechanism designed to preclude landowners from producing relevant evidence opposing that offered by the Government.").

The facts of the present case are actually more egregious than those of *Gwathmey*. The *Gwathmey* property owners at least were allowed to present some generalized evidence of value that applied to all 200 tracts. *See Gwathmey*, 557 F.2d at 151-52 (discussing evidence presented by owners' attorneys). By contrast, the VFW was not permitted to present any evidence of the value of its property whatsoever. Pet. for Cert. at 28.

The grant of a writ of certiorari is particularly appropriate when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort *or of a United States court of appeals*." SUP. CT. R. 10(b) (emphasis added). The Due Process Clause issue in this case qualifies.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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In The
Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874 VETERANS OF FOREIGN WARS OF THE UNITED STATES,

Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS AND WISCONSIN BUILDERS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When the Milwaukee Redevelopment Authority took by eminent domain the 11-story downtown building that housed the offices of Post 2874 of the Veterans of Foreign Wars (VFW) as a long-term lessee, the Wisconsin Supreme Court held 4 to 3 that – as a matter of law – the VFW was not entitled to present any evidence of value, nor entitled to recover any compensation whatever for its concededly valuable long-term leasehold.

The questions presented are:

1. Does it violate the 5th and 14th Amendments for Wisconsin – like some jurisdictions, but in conflict with others and with this Court's repeated insistence that the appropriate question in an eminent domain proceeding is "what has the owner lost, not what has the taker gained" – to apply its "undivided fee rule" in such circumstances?

2. Did the court below violate VFW's constitutional right to due process of law by precluding it, as the owner of a valuable interest in property being taken through eminent domain, from introducing any evidence of the value of its leasehold property?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry.[1] As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations, of which the Wisconsin Builders Association (WBA) is one. About one-third of NAHB's 175,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires their land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and it supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

NAHB is a vigilant advocate in the Nation's courts, and it frequently participates as a party

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than *amici* made a monetary contribution toward the preparation or submission of this brief.

litigant and *amicus curiae* to safeguard the property rights and interests of its members. For example, NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007), and also participated in many other cases before this Court as *amicus curiae* or of counsel. A large number of those cases involved property rights and eminent domain issues, including regulatory takings, due process, and the Fifth Amendment's Public Use Clause.[2] Determining that a

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[2] Cases in which NAHB has appeared as an *amicus curiae* or of counsel before this Court include: *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v.*

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leasehold interest does not constitute a property interest sends the wrong signal to property owners and holders of such interests. For example, the owner of a retail shopping center would be unable to assert that her tenants hold a valuable property interest in any condemnation that utilizes the undivided fee rule.

WBA is a statewide organization of builders, developers, and remodelers dedicated to the business of constructing residential housing, remodeling, light commercial construction, and related services. A significant part of the WBA's mission is to provide Wisconsin residents access to the housing of their choice and the opportunity to realize the American dream of home ownership. Its members conduct their business affairs with professionalism and skill. The WBA consists of 25 local homebuilder associations and approximately 6,500 members. On behalf of its members, the WBA regularly expresses its position on issues of significance, including questions of property rights and protections. The WBA believes that protecting the rights of Wisconsin residents and businesses to just compensation if their property is taken by eminent domain is crucial.

United States, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 55 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 551 U.S. 130 (2008); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Protection Agency*, 129 S. Ct. 1498 (2009); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009).

SUMMARY OF ARGUMENT

The "undivided fee" rule – a rule of convenience under which a court will not value a leasehold interest separately if it is condemned along with the fee simple estate – cannot override the Fifth Amendment's guarantee of just compensation when property is taken.

A uniform standard is sorely lacking and the Wisconsin Supreme Court's rigid application of the undivided fee rule resulted in the literal evaporation of what was acknowledged by all parties to be a valuable property interest. The Private Property and Just Compensation Clauses require more.

Leaseholds are "property" protected from uncompensated takings by the Fifth Amendment, and if the VFW's lease alone had been condemned, there would be no question it would be entitled to compensation and to have a jury determine the lease's value. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 380 (1945) ("The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.").

The Wisconsin court's application of the undivided fee rule to value that lease at zero as a matter of law simply because the fee simple interest was also being acquired – and to prohibit the VFW from presenting evidence of the lease's actual value to the jury – ignored its status as Fifth Amendment property, entitled to recognition independent of the fee simple interest, and separate valuation.

This Court should grant the writ of certiorari to review the Wisconsin Supreme Court's conclusion that in eminent domain law, somehow the whole can be *lesser* than the sum of its parts.

ARGUMENT

I. LACKING THIS COURT'S GUIDANCE, JUST COMPENSATION JURISPRUDENCE HAS FRACTURED

The Takings Clause provides that "nor shall private property be taken for public use without just compensation." U.S. CONST. AMEND. V. "The critical terms are 'property,' 'taken' and 'just compensation.'" *General Motors Corp.*, 323 U.S. at 377.

In the past half-century, this Court has clarified in what circumstances a valuable interest qualifies as "property" for purposes of the Takings Clause. *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (interest generated by money deposited in lawyers' trust accounts is property); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (interest on monies deposited in court is property); *Babbitt v. Youpee*, 519 U.S. 234 (1977) (the ability to transfer and receive property by descent or devise is property).

This Court has also clarified the standards for when a taking by the eminent domain power is "for public use." *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005) (takings supported only by claims of

economic development are not always violative of the Public Use Clause); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) ("public use" is coterminous with the police power); *Berman v. Parker*, 348 U.S. 26 (1954) (taking of non-blighted property as part of a larger redevelopment project is not inconsistent with the Public Use Clause).

Guidance regarding the third part of the eminent domain equation, however, has been largely absent. The lack of attention is not the consequence of the law governing compensation in condemnation cases being well-settled, uniformly applied, and truly "just" (as the decision by the Wisconsin Supreme Court makes painfully clear). To the contrary, the long absence of guidance has permitted the majority of the lower courts to wander in the jurisprudential wilderness, and apply dramatically different rules that vary by locale with no discernible criteria or consistency; sometimes, as in the case at bar, with bizarre and inequitable results.[3] *See, e.g.*, Gideon Kanner, *And*

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[3] Two Wisconsin justices concurred with the result reached by the majority below, while at the same time decrying its injustice. *See City of Milwaukee Post No. 2874 Veterans of Foreign Wars of the United States v. Redevelopment Auth. of the City of Milwaukee*, 768 N.W.2d 749, 770 (Wis. 2009) (Ziegler, J., concurring) ("While it is often said that bad facts make bad law, this court has not succumbed to that legal axiom in this case despite the absolutely dreadful situation the VFW finds itself in. . . . The VFW claimed its interest in the property was $1.8 million, but pursuant to the unit rule, the VFW was unfortunately left with no money for its interest in the property. As a result, the VFW was left not only with no place to conduct its

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Now, For a Word From the Sponsor: People v. Lynbar, Inc. *Revisited*, 5 U.S.F.L. REV. 39 (1970-71). As the petition correctly notes, the lower courts treat similarly situated cases differently, with some jurisdictions rigidly applying the undivided fee rule to *always* prohibit the separate valuation of lesser property interests, others *never* applying the rule, with still others utilizing the rule in *most* circumstances but refusing to apply it when it would result in a denial of compensation. *See* Pet. 13-17.

Whether the owners of leaseholds are entitled for their interests to be recognized as a matter of baseline Fifth Amendment law, and to be compensated when those interests are confiscated for public use "presents an important phase of the law of eminent domain." *United States v. Petty Motor Co.*, 327 U.S. 372, 373 (1946). The VFW's petition presents an excellent vehicle to revisit an area long deprived of this Court's direction.[4]

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business, but it was left with no money to find a new place to call home.").

[4] More recently, the compensation issue has appeared to be of interest in eminent domain and regulatory takings cases, even when the issue was not presented in the petition. *See, e.g.*, Transcript, *Kelo v. City of New London*, No. 04-108, at 21-22 (Feb. 23, 2005) ("JUSTICE KENNEDY: Let me ask you this, and it's a little opposite of the particular question presented. Are there any writings or scholarship that indicates that when you have property being taken from one private person ultimately to go to another private person that what we ought to do is to adjust the measure of compensation, so that the owner – the

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II. UNBENDING APPLICATION OF THE UNDIVIDED FEE RULE FAILS TO RESPECT LEASEHOLD INTERESTS AS FIFTH AMENDMENT PROPERTY

State law generally is determinative of whether a particular interest is "property," *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), and Wisconsin law recognizes leaseholds as such. *See Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794, 806 (Wis. 1980) ("[i]t is well settled that a lessee has a property interest; and, when that interest is completely taken by a condemning authority, the

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condemnee – can receive some sort of premium for the development?"); *id.* at 48 ("JUSTICE BREYER: So going back to Justice Kennedy's point, is there some way of assuring that the just compensation actually puts the person in the position he would be in if he didn't have to sell his house? Or is he inevitably worse off?"); Transcript, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envt'l Protection*, No. 08-11, at 18 (Dec. 2, 2009) ("JUSTICE KENNEDY: Let me ask you this question on Florida valuation. Assume you prevail, there's a cause of action for a taking. You have a beachfront area, beachfront home, in which there's a hurricane and there's a loss of the beach and a sudden drop, so that it's now a 60-foot, a 60-foot drop. The State comes in and says the only way they can fix this is to extend the beach and make it a larger beach on what was formerly our submerged land, and it does that, and it has the same rule. Under your view, is the State required to pay you for the loss of your right of contact to the beach, your littoral right, because there's let's say another 100 foot of new beach? Are they entitled to offset that against the enhanced value to your property by reason of the fact that they've saved it from further erosion and have given you a beach where there was none before?").

lessee is entitled to compensation."). Thus, as a matter of federal constitutional law which establishes the baseline under which no state may go, *see Kelo*, 545 U.S. at 489, state law may not deny compensation by a legal fiction if a leasehold is taken. If condemned, a lease must be recognized and valued:

> Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing. . . . The right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs, or collateral arrangements of the occupier, has a value.

United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). In *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), this Court held that when property subject to a leasehold is condemned, the lessee's possessory interest is extinguished, but the interest is entitled to be compensated at its fair market value. *Id.* at 378-79. Thus, there is no doubt that if Respondent were to have condemned only the VFW's leasehold interest, and not the fee simple interest, it would be obligated to pay compensation since the courts below could not assume the VFW's lease had no market value. *Veterans of Foreign Wars*, 768 N.W.2d at 752 (the VFW made an offer of proof of the value of its lease).

Yet, the majority below determined that the VFW's lease had no existence as a matter of law, simply because the fee simple interest was also being condemned:

> As we have stated, under the unit rule there is no separate valuation of improvements or natural attributes of the land, and the manner in which the land is owned or the number of owners does not affect the value of the property. When property that is held in partial estates by multiple owners is condemned, the condemnor provides compensation by paying the value of an undivided interest in the property rather than by paying the value of each owner's partial interest. Simply stated, the unit rule determines the fair market value as if only one person owned the property. When the value of the property is determined, the condemnor makes a single payment for the property taken and the payment is then apportioned among the various owners.

Id. at 758 (footnotes and citations omitted). This is not what would happen in a market sale, and it should not happen in eminent domain. The majority below attempted to support its conclusion by reference to *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003). *See Veterans of Foreign Wars*, 768 N.W.2d at 767-68. In *Brown*, this Court held that although the interest generated by Washington's Interest on Lawyers' Trust Accounts (IOLTA) program was property, that property was valueless as a matter

of fact. *Brown*, 538 U.S. at 240. It is one thing for a court to conclude that if property is in fact worthless, that no compensation is "just compensation." However, it is of an altogether different dimension for a court to impose a rule of law prohibiting compensation for a valuable interest, simply because the form in which the property is held makes it less convenient for the court (or more expensive for the condemnor) to value each interest separately. *Veterans of Foreign Wars*, 768 N.W.2d at 758.

The *Brown* rule respected the nature of interest-on-principal as Fifth Amendment property, while recognizing that as a matter of fact its value was zero as a consequence of the way the Washington IOLTA program was structured. *Brown*, 538 U.S. at 239 (the individual deposits made to the IOLTA accounts could not have generated interest). By contrast, the undivided fee rule as applied by the court below assumes the VFW's lease was legally valueless (contrary to reality), and in place of this reality, imposed a legal fiction. *Veterans of Foreign Wars*, 768 N.W.2d at 758 ("Simply stated, the unit rule determines the fair market value *as if* only one person owned the property.") (emphasis added). The application of the undivided fee rule did not merely conclude the VFW's lease was property (but valueless), it determined it was not even property at all. *Veterans of Foreign Wars*, 768 N.W.2d at 772 (Prosser, J., dissenting) ("In short, may the Redevelopment Authority extinguish the leaseholder's rights without any compensation and still comply

with all the constitutional requirements designed to protect private property rights?"). The undivided fee rule is not a constitutional mandate. In *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910), this Court deprived the undivided fee rule of any constitutional pedigree when it held "[t]he Constitution does not require . . . a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole."

The converse is equally correct: when property *is* held as an encumbered whole, the Fifth and Fourteenth Amendments require it – as "property" – to be valued as an encumbered whole.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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